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THE LAW OF CHARITY TRUSTS

THE LAW OF CHARITY TRUSTS

UNDER

MASSACHUSETTS DECISIONS

BY

JOHN NOBLE

A.B., LL.B., HARV.

OF THE SUFFOLK BAR

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SECOND EDITION

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PREFACE TO SECOND EDITION

These notes were published in pamphlet form in 1902. Since then many cases relating to charities have been before the Supreme Judicial Court. Some of these cases involve extensions of the principles of earlier decisions. Institutions of a character not previously passed upon have been held to be charitable. There have been many applications of the *cy-pres* doctrine, and some important cases on taxation and liability for torts. In this edition the notes have been brought down to include the decisions through 1917. The book has been rewritten and the arrangement changed. The subjects of taxation and liability of charitable institutions for torts, which were not covered in the first edition, have been added.

J.N.

BOSTON, January 1, 1918.

CONTENTS

CHAPTER PAGE

Introduction 1

I. The Nature of a Charity Trust 3

II. Peculiarities of Charity Trusts 28

(*a*) Indefiniteness 28

(*b*) Duration 31

(*c*) Directions for Accumulation . . . 35

(*d*) Administration *cy-pres* 38

III. Management and Procedure 48

IV. Taxation 69

(*a*) Of Property 69

(*b*) Of Devises and Legacies 85

(*c*) On Income 89

V. Liability of Charitable Institutions for Torts 91

TABLE OF CASES

MASSACHUSETTS CASES

SECTION

All Saints Parish *v.* Brookline, 178 Mass. 404 . . 69

Allen *v.* Boston, 159 Mass. 324 92

American Academy *v.* Harvard College, 12 Gray, 582 . . . . 8, 29, 31, 42

American Colonization Society *v.* Smith Charities, 2 Allen, 302 . . . . 18, 29, 38

Amherst Academy *v.* Cowls, 6 Pick. 427 53

Amherst College *v.* Amherst Assessors, 173 Mass. 232 62

Amherst College *v.* Amherst Assessors, 193 Mass. 168 . . . . 59, 62

Amory *v.* Attorney General, 179 Mass. 89 5, 31, 34, 46, 47

Amory *v.* Green, 13 Allen, 413 48

Athol Music Hall Co. *v.* Carey, 116 Mass. 471 . 53

Attorney General *v.* Bedard, 218 Mass. 378 5, 22, 49

Attorney General *v.* Briggs, 164 Mass. 561 . . 10, 31

Attorney General *v.* Brigham, 142 Mass. 248 . . 52

Attorney General *v.* Butler, 123 Mass. 304 . . . 49

Attorney General *v.* Federal Street Meeting-house, 3 Gray, 1 11

Attorney General *v.* Goodell, 180 Mass. 538 . . 22

Attorney General *v.* Old South Society, 13 Allen, 474 . . . . 5, 11, 49, 52

Attorney General *v.* Onset Bay Grove Association, 221 Mass. 342 49

Attorney General *v.* Parker, 126 Mass. 216 . . 43, 49

Attorney General *v.* Trinity Church, 9 Allen, 422 5, 10, 11

SECTION
Austin *v.* Cambridgeport Parish, 21 Pick. 215 . 38
Babcock *v.* Leopold Morse Home, 225 Mass. 418 . 60
Baker *v.* Clarke Institution, 110 Mass. 88 . 5, 29, 37
Baker *v.* Fales, 16 Mass. 495 11
Baker *v.* Smith, 13 Met. 34 . . . . 35, 42
Balch *v.* Shaw, 174 Mass. 144 . . . . 55, 73, 74
Bartlet *v.* King, 12 Mass. 537 . . . . 5, 10
Bartlett, Petitioner, 163 Mass. 509 . 8, 10, 12, 34, 47
Bartlett *v.* Nye, 4 Met. 378 . . . . 10, 41
Bates *v.* Bates, 134 Mass. 110 10
Bates *v.* Sharon, 175 Mass. 293 58
Batt *v.* Treasurer and Receiver General, 209 Mass. 319 73
Bell *v.* Nesmith, 217 Mass. 254 . . . . 18, 36, 38
Benton *v.* Boston City Hospital, 140 Mass. 13 . 92
Bliss *v.* American Bible Society, 2 Allen, 334 . . 32
Bodman *v.* American Tract Society, 9 Allen, 447 47
Bolster *v.* Lawrence, 225 Mass. 387 . . . . . 91, 92
Boston *v.* Doyle, 184 Mass. 373 12, 29, 36, 39, 41, 43, 47
Boston Lodge of Elks *v.* Boston, 217 Mass. 176 55, 60
Boston Safe Deposit & Trust Co. *v.* Plummer, 142 Mass. 257 20
Boston Society of Redemptorist Fathers *v.* Boston, 129 Mass. 178 . . . . 55, 58, 65
Boutell *v.* Cowdin, 9 Mass. 254 53
Bowden *v.* Brown, 200 Mass. 269 . . . . . . 33, 47
Bradbury *v.* Birchmore, 117 Mass. 569 50
Brattle Square Church *v.* Grant, 3 Gray, 142 . 10, 26
Bridgewater Academy *v.* Gilbert, 2 Pick. 579 . 53
Brown *v.* Kelsey, 2 Cush. 243 . . . . . . 6, 10, 37

SECTION
Bullard *v.* Attorney General, 153 Mass. 249 . . 48
Bullard *v.* Chandler, 149 Mass. 532 10, 23, 24, 36, 49
Bullard *v.* Shirley, 153 Mass. 559 . . . . . . 10, 33
Burbank *v.* Burbank, 152 Mass. 254 . 5, 12, 36, 49
Burbank *v.* Whitney, 24 Pick. 146 . . . . . 5, 10
Burr *v.* Boston, 208 Mass. 537 54
Burr *v.* Mass. School for Feeble Minded, 197 Mass. 357 51
Butman *v.* Newton, 179 Mass. 1 92
Callahan, Petitioner, Davis, Land Court Decisions, 258 46
Callahan *v.* Woodbridge, 171 Mass. 595 47
Cambridge *v.* County Commissioners, 114 Mass. 337 . . . . 61, 62
Capen *v.* Skinner, 177 Mass. 84 38
Cary Library *v.* Bliss, 151 Mass. 364 . 8, 33, 42, 45
Chamberlain *v.* Stearns, 111 Mass. 267 . . . 7, 49
Chapel of the Good Shepherd *v.* Boston, 120 Mass. 212 61
Chapin *v.* Holyoke Y.M.C.A., 165 Mass. 280 . . 82
Charlesbank Homes *v.* Boston, 218 Mass. 14 . . 60
Chase *v.* Dickey, 212 Mass. 555 . . . 7, 10, 18, 37
City Missionary Society *v.* Memorial Church, 186 Mass. 531 . . . . 36, 42, 47
Codman *v.* Brigham, 187 Mass. 309 27, 29, 30, 31, 37, 47
Codman *v.* Crocker, 203 Mass. 146 45
Coe *v.* Washington Mills, 149 Mass. 543 15
Collector of Taxes *v.* Mount Auburn Cemetery, 217 Mass. 286 70
Collector of Taxes *v.* Oldfield, 219 Mass. 374 . . 12

SECTION

Conklin *v.* John Howard Industrial Home, 224 Mass. 222 . . . . 16, 83
Cottage Street Church *v.* Kendall, 121 Mass. 528 . 53
Crawford *v.* Nies, 220 Mass. 61 46
Crawford *v.* Nies, 224 Mass. 474 . 10, 35, 45, 47, 49
Curran *v.* Boston, 151 Mass. 505 91
Darcy *v.* Kelley, 153 Mass. 433 . 5, 23, 32, 41, 49
Davies *v.* Boston, 190 Mass. 194 92
Davis *v.* Barnstable, 154 Mass. 224 . . . . 8, 49
Davis *v.* Central Congregational Society, 129 Mass. 367 . . . . 82, 87
Davis *v.* Treasurer and Receiver General, 208 Mass. 343 74
Deane *v.* Home for Aged Colored Women, 111 Mass. 132 47
Dexter *v.* Gardner, 7 Allen, 243 . . . . . 10, 26
Dexter *v.* Harvard College, 176 Mass. 192 . 8, 23, 30
Dickinson *v.* Boston, 188 Mass. 595 92
Dickson *v.* United States, 125 Mass. 311 . 12, 31, 36
Dodge *v.* Morse, 129 Mass. 423 48
Donnelly *v.* Boston Catholic Cemetery, 146 Mass. 163 . . . . 17, 94
Donohue *v.* Newburyport, 211 Mass. 561 . . . 91
Drury *v.* Natick, 10 Allen, 169 1, 3, 8, 18, 36, 38, 39, 42, 47
Earle *v.* Wood, 8 Cush. 430 . . . . 1, 10
Easterbrooks *v.* Tillinghast, 5 Gray, 17 . . . 10, 33
Eastman *v.* Allard, 149 Mass. 154 43
Ellis *v.* Hunt, 228 Mass. 39 49
Ely *v.* Attorney General, 202 Mass. 545 . . . 30, 31
Emerson *v.* Milton Academy, 185 Mass. 414 59, 62, 63

SECTION
Essex *v.* Brooks, 164 Mass. 79 73
Essex County *v.* Salem, 153 Mass. 141 54
Evangelical Baptist Society *v.* Boston, 204 Mass. 28 . . . . 69, 71, 72
Fairbanks *v.* Lamson, 99 Mass. 533 10
Farmington Academy *v.* Allen, 14 Mass. 172 . . 53
Farrigan *v.* Pevear, 193 Mass. 147 82, 83, 85, 87, 88, 90, 94
Faulkner *v.* National Sailors' Home, 155 Mass. 458 . . . . 5, 10, 32
Fay *v.* Locke, 201 Mass. 387 . . . . 36, 38
Fellows *v.* Miner, 119 Mass. 541 5, 10, 27, 32, 35, 37
First Parish in Sutton *v.* Cole, 3 Pick. 232 . . 8, 36
First Society in North Adams *v.* Boland, 155 Mass. 171 . . . . 26, 38
First Society in North Adams *v.* Fitch, 8 Gray, 421 . . . . 10, 29, 40
First Universalist Society in Salem *v.* Bradford, 185 Mass. 310 . . . . 55, 58, 73
Franklin Square House *v.* Boston, 188 Mass. 409 5, 56, 60, 66
Frost *v.* Thompson, 219 Mass. 360 50
Garden Cemetery Corporation *v.* Baker, 218 Mass. 339 64
Giles *v.* Boston Fatherless and Widows' Society, 10 Allen, 355 38
Gill *v.* Attorney General, 197 Mass. 232 . 6, 27, 33
Going *v.* Emery, 16 Pick. 107 . . . . 1, 10
Gooch *v.* Association for Relief of Aged Females, 109 Mass. 558 . . . . 5, 16, 50
Green *v.* Hogan, 153 Mass. 462 10

SECTION
Greene Foundation *v.* Boston, 12 Cush. 54 . . . 69
Grimke *v.* Attorney General, 206 Mass. 49 . . . 30
Hadley *v.* Hopkins Academy, 14 Pick. 240 . . 1, 8
Hall *v.* Coggswell, 183 Mass. 521 48
Hand *v.* Brookline, 126 Mass. 324 92
Hardy *v.* Waltham, 7 Pick. 108 72
Harvard College *v.* Attorney General ("Harvard-Tech. Merger"), 228 Mass. 396 . . 42, 47
Harvard College *v.* Boston, 104 Mass. 470 . . . 72
Harvard College *v.* Cambridge, 175 Mass. 145 62, 63
Harvard College *v.* Theological Education Society, 3 Gray, 280 . . . . . 8, 10, 33, 42, 49
Hawes Place Society *v.* Trustees of Hawes Fund, 5 Cush. 454 . . . . 10, 29
Hayden *v.* Stoughton, 5 Pick. 528 . . . . 8, 33, 36
Healy *v.* Reed, 153 Mass. 197 . . . . 10, 19
Higginson *v.* Boston, 212 Mass. 583 91
Higginson *v.* Turner, 171 Mass. 586 . . . . 36, 40
Hill *v.* Boston, 122 Mass. 344 91
Hill *v.* Moors, 224 Mass. 163 48
Hinckley *v.* Thatcher, 139 Mass. 477 . . 10, 32, 49
Holder *v.* Massachusetts Horticultural Society, 211 Mass. 370 . . . . 84, 87, 88, 90
Holleran *v.* Boston, 176 Mass. 75 91
Holmes *v.* Coates, 159 Mass. 226 . . . . . . 5, 22
Hooper *v.* Shaw, 176 Mass. 190 74
Howard *v.* Howard, 227 Mass. 395 . . . . . . 6, 18
Howard *v.* Worcester, 153 Mass. 426 91
Howe *v.* Lowell, 171 Mass. 575 38
Hubbard *v.* Worcester Art Museum, 194 Mass. 280 . . . . 8, 19, 32, 37, 41

SECTION
Ives *v.* Sterling, 6 Met. 310 53
Jackson *v.* Phillips, 14 Allen, 539
1, 4, 5, 14, 26, 31, 34, 49, 56
Johnson *v.* Worcester, 172 Mass. 122 92
Kelley *v.* Boston, 186 Mass. 165 91
Kent *v.* Dunham, 142 Mass. 216 . . . . . . 22, 26
Kerr *v.* Brookline, 208 Mass. 190 91
Ladies' Collegiate Institute *v.* French, 16 Gray, 196 53
Lessard *v.* Revere, 171 Mass. 294 51
Limerick Academy *v.* Davis, 11 Mass. 113 . . . 53
Little *v.* Holyoke, 177 Mass. 114 92
Little *v.* Newburyport, 210 Mass. 414 . . . . 10, 56
Loring *v.* Wilson, 174 Mass. 132 5
Lowell, Appellant, 22 Pick. 215 . . . . . . 8, 39
Lowell Meetinghouse *v.* Lowell, 1 Met. 538 . . 69
Lynch *v.* Springfield, 174 Mass. 430 92
Lynn Workingmen's Aid Association *v.* Lynn, 136 Mass. 283 58
Marsh *v.* Renton, 99 Mass. 132 . . . . . . 5, 36, 43
Martin *v.* Meles, 179 Mass. 114 53
Masonic Education and Charity Trust *v.* Boston, 201 Mass. 320 . . . . 15, 55, 67
Massachusetts General Hospital *v.* Somerville, 101 Mass. 319 . . . . 59, 62
Massachusetts Society for Prevention of Cruelty to Animals *v.* Boston, 142 Mass. 24 13
McAlister *v.* Burgess, 161 Mass. 269 . . . . . 11, 49
McDonald *v.* Massachusetts General Hospital, 120 Mass. 432 . . . . 16, 81, 85
McQuesten *v.* Attorney General, 187 Mass. 185 . 49

SECTION

Milford *v.* County Commissioners, 213 Mass. 162 . . . 63, 67, 70
Minns *v.* Billings, 183 Mass. 126 . . . 5, 6, 9, 13, 15, 23, 36, 47, 56
Minot *v.* Attorney General, 189 Mass. 176 . . . 7
Minot *v.* Baker, 147 Mass. 348 . . . . 6, 31
Minot *v.* Boston Asylum, 7 Met. 416 . . . . 5, 32
Minot *v.* Winthrop, 162 Mass. 113 . . . . . 55, 73
Missionary Society *v.* Chapman, 128 Mass. 265 . 41
Molly Varnum Chapter, D.A.R., *v.* Lowell, 204 Mass. 487 . . . . 8, 9, 59
Morse *v.* Natick, 176 Mass. 510 10
Morville *v.* American Tract Society, 123 Mass. 129 . . . . 18, 38
Morville *v.* Fowle, 144 Mass. 109 . . . . . . 10, 43
Mount Auburn Cemetery *v.* Cambridge, 150 Mass. 12 64
Mount Hermon Boys' School *v.* Gill, 145 Mass. 139 59
Mulchey *v.* Methodist Religious Society, 125 Mass. 487 . . . . 82, 89
Murdock, Appellant, 7 Pick. 303 43
Neff *v.* Wellesley, 148 Mass. 487 92
Nelson *v.* Cushing, 2 Cush. 519 . . . . 29, 44
Nelson *v.* Georgetown, 190 Mass. 225 . . . 47, 50
Newcombe *v.* Boston Protective Department, 151 Mass. 215 . . . . 15, 17
New England Hospital for Women and Children *v.* Boston, 113 Mass. 518 . . . . 59, 65
New England Sanitarium *v.* Stoneham, 205 Mass. 335 . . . . 56, 62, 66

SECTION
New England Theosophical Corporation *v.* Assessors of Boston, 172 Mass. 60 57
Nichols *v.* Allen, 130 Mass. 211 . . . . 7, 22
Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 88
Norris *v.* Loomis, 215 Mass. 344 . . . 22, 31, 34
Northampton *v.* County Commissioners, 145 Mass. 108 72
Northampton *v.* Smith, 11 Met. 390 . . . 5, 8, 29
O'Brien *v.* Cunard Steamship Co., 154 Mass. 272 87
O'Brien *v.* Worcester, 172 Mass. 348 92
Odell *v.* Odell, 10 Allen, 1 . 5, 10, 25, 26, 27, 28, 37
Oldfield *v.* Attorney General, 219 Mass. 378 . 30, 48
Old South Association *v.* Boston, 212 Mass. 299 . 72
Old South Society *v.* Boston, 127 Mass. 378 . 58, 69
Old South Society *v.* Crocker, 119 Mass. 1 11, 32, 41, 46
Oliver *v.* Worcester, 102 Mass. 489 92
Olliffe *v.* Wells, 130 Mass. 221 33
Osgood *v.* Rogers, 186 Mass. 238 . . . 11, 31, 82
Parker *v.* May, 5 Cush. 336 49
Parkhurst *v.* Treasurer and Receiver General, 228 Mass. 196 . . . . 12, 14
Phi Beta Epsilon Corporation *v.* Boston, 182 Mass. 457 . . . . 60, 63
Phillips Academy *v.* Andover, 175 Mass. 118 61, 62, 63, 64
Phillips Academy *v.* King, 12 Mass. 545 . . . 8, 10
Pierce *v.* Cambridge, 2 Cush. 611 58
Pierce *v.* Stevens, 205 Mass. 219 74
Pope *v.* Hinckley, 209 Mass. 323 41

SECTION
Porter *v.* Howe, 173 Mass. 521 . . . . . . 5, 10, 20
Princeton *v.* Adams, 10 Cush. 129 38
Proctor *v.* Heyer, 122 Mass. 525 48
Proprietors of Mount Hope Cemetery *v.* Boston, 158 Mass. 509 45
Quincy *v.* Attorney General, 160 Mass. 431 . 8, 36, 49
Read *v.* Willard Hospital, 215 Mass. 132 . . 32, 41
Rice *v.* Bradford, 180 Mass. 545 73
Richards *v.* Church Home for Orphan Children, 213 Mass. 502 . . . . 32, 47
Richardson *v.* Essex Institute, 208 Mass. 311 . 24, 47
Richardson *v.* Massachusetts Charitable Mechanic Association, 131 Mass. 174 43
Richardson *v.* Mullery, 200 Mass. 247 12, 31, 34, 36, 47
Richardson School Fund *v.* Dean, 130 Mass. 242 . 8
Ripley *v.* Brown, 218 Mass. 33 . . . . 30, 48
Robinson *v.* Nutt, 185 Mass. 345 53
Rotch *v.* Emerson, 105 Mass. 431 . . . . . 6, 7, 8
Rowley, Petitioner, Davis, Land Court Decisions, 266 46
Saint James Educational Institute *v.* Salem, 153 Mass. 185 58
Saint Paul's Church *v.* Attorney General, 164 Mass. 188 . . . . 7, 10, 11, 30, 52
Salem Lyceum *v.* Salem, 154 Mass. 15 61
Salem Marine Society *v.* Salem, 155 Mass. 329 55, 69
Saltonstall *v.* Sanders, 11 Allen, 446 . . . 7, 24, 36
Sanderson *v.* White, 18 Pick. 328 1, 3, 8, 41, 43, 44, 49
Schouler, Petitioner, 134 Mass. 426 . . . 6, 10, 40

SECTION
Seamen's Friend Society *v.* Boston, 116 Mass. 181 64
Sears *v.* Attorney General, 193 Mass. 551 11, 22, 82
Sears *v.* Chapman, 158 Mass. 400 . . . . . . 8, 31
Second Society of Boxford *v.* Harriman, 125 Mass. 321 . . . . 8, 36, 52
Sherman *v.* Congregational Missionary Society, 176 Mass. 349 . . . . 5, 16, 31
Silsby *v.* Barlow, 16 Gray, 329 26
Smethurst *v.* Barton Square Church, 148 Mass. 261 . . . . 82, 89
Smith *v.* Town of Norton, 214 Mass. 593 . . . 52
Sohier *v.* Burr, 127 Mass. 221 . . . . . . 5, 37, 48
Somerville *v.* Waltham, 170 Mass. 160 54
Stacy *v.* Lyon, 3 Pick. 390 8
Staples *v.* Somerville, 176 Mass. 237 51
Stewart *v.* Harvard College, 12 Allen, 58 . . 84, 87
Stratton *v.* Mount Hermon Boys' School, 216 Mass. 83 95
Stratton *v.* Physio-Medical College, 149 Mass. 505 17, 32, 33, 34
Street Commissioners *v.* Boston Asylum, 180 Mass. 485 64
Sturgis *v.* Theological Society, 130 Mass. 414 . . 95
Sullivan *v.* Holyoke, 135 Mass. 273 92
Suter *v.* Hilliard, 132 Mass. 412 . . . . 5, 7
Sweetser *v.* Manning, 200 Mass. 378 54
Tainter *v.* Clark, 5 Allen, 66 . . . . 8, 29
Teele *v.* Bishop of Derry, 168 Mass. 341 . . . 10, 33
Thayer *v.* Wellington, 9 Allen, 283 33

SECTION

Theological Education Society *v.* Attorney General, 135 Mass. 285 . . . . 5, 8, 26, 31

Third Congregational Society *v.* Springfield, 147 Mass. 396 69

Thompson *v.* Page, 1 Met. 565 53

Thornton *v.* Franklin Square House, 200 Mass. 465 . . . . 16, 83, 85, 87

Thorp *v.* Lund, 227 Mass. 474 . . . . . . 5, 9, 12

Tindley *v.* Salem, 137 Mass. 171 92

Trinity Church *v.* Boston, 118 Mass. 164 . . . 69

Trustees of Ministerial Fund *v.* Gloucester, 19 Pick. 542 69

Trustees of Pembroke Church *v.* Stetson, 5 Pick. 506 53

Tucker *v.* Seaman's Aid Society, 7 Met. 188 10, 32, 34, 47

Vannah *v.* Hart Private Hospital, 228 Mass. 132 86

Waldron *v.* Haverhill, 143 Mass. 582 92

Ware *v.* Fitchburg, 200 Mass. 61 . . . . . . 45, 47

Washburn *v.* Sewall, 9 Met. 280 . . . . . . 5, 32

Watkins *v.* Eames, 9 Cush. 537 53

Watson *v.* Boston, 209 Mass. 18 55

Wayland *v.* County Commissioners, 4 Gray, 500 54

Webb *v.* Neal, 5 Allen, 575 . . . . 5, 24, 36, 40

Weber *v.* Bryant, 161 Mass. 400 . . . . . . 7, 49

Weeks *v.* Hobson, 150 Mass. 377 . . . . . 5, 31, 46

Wells *v.* Doane, 3 Gray, 201 6

Wesleyan Academy *v.* Wilbraham, 99 Mass. 599 . 59

Weston *v.* Amesbury, 173 Mass. 81 . . . . . 5, 36

White *v.* Ditson, 140 Mass. 351 . . . . . . 4, 6, 39

Wilcox *v.* Attorney General, 207 Mass. 198 . . 33, 47

SECTION
Williams College *v.* Danforth, 12 Pick. 541 . . . 53
Williams College *v.* Williamstown, 167 Mass. 505 62
Williams College *v.* Williamstown, 219 Mass. 46 . 64
Williston Seminary *v.* County Commissioners, 147 Mass. 427 55
Winslow *v.* Cummings, 3 Cush. 358 . . . 6, 10, 20
Winthrop *v.* Attorney General, 128 Mass. 258 8, 33, 35, 42, 49
Worcester Agricultural Society *v.* Worcester, 116 Mass. 189 64
Worcester County *v.* Worcester, 116 Mass. 193 . 54
Young *v.* Falmouth, 183 Mass. 80 51
Young Men's Temperance & Benevolent Society *v.* Fall River, 160 Mass. 409 . . . . . 15, 56
Zoulalian *v.* New England Sanatorium, S.J.C. May 22, 1918 . . . . 90*a*

Cases from Other States

Abston *v.* Waldron Academy, 118 Tenn. 24 . . 81, 87
Adams *v.* University Hospital, 99 S.W. Rep. 453 (Mo.) 81, 87
Altman, *In re,* 149 N.Y. Supp. 601 17
American Bible Society *v.* American Tract Society, 62 N.J. Eq. 219 32
Armstrong *v.* Wesley Hospital, 170 Ill. App. 81 . 86
Basabo *v.* Salvation Army, 85 Atl. Rep. 120 (R.I.) 82, 90
Bishop *v.* Trustees of the Bedford Charity, 1 El. & El. 697 84
Blaechinska *v.* Howard Mission, 56 Hun, 322 . . 90

SECTION

Bruce *v.* Central Church, 147 Mich. 230 . 85, 87, 90
Christ's Hospital *v.* Grainger, 16 Sim. 83 . . . 28
Coe *v.* Wise, L.R. 1 Q.B. 711 81
Coleman's Estate, 167 Cal. 212 13
Commissioner of Charitable Donations *v.* Baroness deClifford, 1 Dru. & War. 245 26
Congregation Kal Israel *v.* City of New York, 1 N.Y. Supp. 36 69
Corbett *v.* Saint Vincent's Industrial Home, 177 N.Y. 16 93
Craig *v.* Benedictine Sisters' Hospital, 88 Minn. 535 94
Currier *v.* Dartmouth College, 117 Fed. Rep. 44 87
Donaldson *v.* General Public Hospital of St. John, 30 N.B. 279 81
Dudden *v.* Guardians of the Poor, 1 H. & N. 627 81, 95
Duncan *v.* Nebraska Sanatorium, 137 N.W. Rep. 1120 86
Eccles *v.* R. I. Hospital Trust Co., 90 Conn. 592 . 32
Fire Insurance Patrol *v.* Boyd, 120 Pa. St. 624 . 81
Fordyce *v.* Women's Library Association, 79 Ark. 550 81
Gable *v.* Sisters of Saint Francis, 227 Pa. St. 254 81
Gartland *v.* New York Zoölogical Society, 135 App. Div. 163 90
Gittzhoffen *v.* Sisters of Holy Cross Hospital, 32 Utah, 46 94
Glavin *v.* R.I. Hospital, 12 R.I. 411 . . . . . 81, 87
Glover *v.* Baker, 83 Atl. Rep. 916 (N.H.) . . . 10
Godfrey *v.* Hutchins, 28 R.I. 517 47

SECTION
Goodman *v.* Brooklyn Hebrew Orphan Asylum, 165 N.Y. Supp. 949 87
Hall & Moody Institute *v.* Copass, 108 Tenn. 582 50
Hamburger *v.* Cornell University, 166 N.Y. Supp. 46 87
Hearns *v.* Waterbury Hospital, 66 Conn. 98 . . 85
Hewitt *v.* Women's Aid Hospital Association, 73 N.H. 556 88
Hordern *v.* Salvation Army, 199 N.Y. 233 . . 85, 90
Illinois Central Railway *v.* Buchanan, 31 Ky. App. 722 87
Kellogg *v.* Church Charity Foundation, 203 N.Y. 191 90
Lakatong Lodge *v.* Board of Education, 84 N.J. Eq. 112 35
Levingston *v.* Guardians of the Poor, 2 Ir. Rep. C.L. 202 . . . . 81, 95
Loeb, *In re,* 152 N.Y. Supp. 879 17
Loeffler *v.* Pratt Hospital, 100 Atl. Rep. 301 (Md.) 83
Magnuson *v.* Swedish Hospital (Wash.), 169 Pac. Rep. 828 85
Morice *v.* Bishop of Durham, 10 Ves. 521 . . . 3
Noble *v.* Hahnemann Hospital, 112 App. Div. 663 90, 92, 93
Ould *v.* Washington Hospital, 95 U.S. 303 . . . 12
Pardoe, *In re,* [1906] 2 Ch. 184 22
Parks *v.* Northwestern University, 218 Ill. 385 . 81
Paterlini *v.* Memorial Hospital Association, 232 Fed. Rep. 359 87
Perry *v.* House of Refuge, 63 Md. 20 81

SECTION

Powers *v.* Massachusetts Homeopathic Hospital, 109 Fed. Rep. 294 . . . . 81, 85, 87
Roche *v.* St. John's Riverside Hospital, 160 N.Y. Supp. 401 86
Schloendorff *v.* New York Hospital, 211 N.Y. 125 90
Tucker *v.* Mobile Infirmary Association, 191 Ala. 572 86
University of London *v.* Yarrow, 23 Beav. 159 . 13
Van Ingen *v.* Jewish Hospital of Brooklyn, 164 N.Y. Supp. 832 . . . . 85, 90, 93
Vidal *v.* Girard's Executors, 2 How. 128 . . . 12
Ward *v.* St. Vincent's Hospital, 39 App. Div. (N.Y.) 624 . . . . 50, 86
Wharton *v.* Warner, 135 Pac. Rep. 235 85
Williams *v.* Louisville Industrial School, 95 Ky. 251 81
Young Men's Christian Association *v.* Estill, 78 S.E. Rep. 1075 (Ga.) 53

THE LAW OF CHARITY TRUSTS

INTRODUCTION

Every executor or trustee under a will containing gifts for charitable purposes may find himself called upon to decide questions that do not occur in the case of gifts to individuals. At the outset the question arises: Is the trust valid—does it fulfil all technical requirements of the law, and can it be performed without risk of personal liability? Or is it void for uncertainty or remoteness, and are the residuary legatees or next of kin entitled to the fund? Is a direction for accumulation of income for an extended period void; and, if so, does that invalidate the trust? If a charitable corporation named as a legatee has been dissolved, what becomes of the legacy? Is the gift subject to succession taxes; and, if exempt from such taxes, is the trust property subject to local taxation? If the testator has left the whole matter of selecting charitable objects to the trustee, how is the gift to be applied so as to carry out his wishes?

The object of these notes is to help trustees answer some of the questions that most commonly arise in connection with charity trusts, by giving in brief form a synopsis of the decisions of the Supreme Judicial Court. The merits of the questions are not discussed, and no attempt is made to deal with the subject theoretically or to forecast decisions on points that have not arisen. The general principles are well established. Most of the new questions that occur can be answered from a knowledge of the decided cases.

CHAPTER I

THE NATURE OF A CHARITY TRUST

Synopsis

§§ 1-3. History of charity trusts in Massachusetts.
4. Definition of a charity.
5-13. Classification of charitable objects:
5. Gifts for charities in the ordinary sense.
6. To what extent power of selection may be left to trustee.
7. Alternative of charitable or non-charitable object fatal.
8. Gifts for literary and educational purposes.
9. Gifts for historical research, memorials, etc.
10-11. Gifts for religious purposes.
12-13. Gifts for public improvements.
14. Gifts to effect change of laws, not charitable.
15. Gifts to mutual-benefit associations, when charitable and when non-charitable.
16. Charging fees does not make institution non-charitable.
17. Institutions for profit cannot be charities.
18. Gifts for charity may be conditional.
19. Limits of property holdings.
20. Testamentary gifts to charity abate equally with other legacies.

§ 1. Charity trusts have been recognized in Massachusetts from the earliest times as a distinct class of trusts. "Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish and carry into effect the intent and purpose of the donor; and trusts which cannot be supported in ordinary cases, for various reasons, will be established and carried into effect, where the trust is raised in support of a gift to a charitable use." [1] For example, if no trustee is named, or if the objects of the gift are uncertain, or if the method of applica-

[1] Shaw, C.J., in *Sanderson* v. *White*, 18 Pick. 328, 333.

tion directed is impossible, the gift will not lapse, but a court of equity will find a way to carry out the testator's plan. The legislature has given its assistance by granting certain exemptions from taxation. It is therefore important for a trustee, as soon as he takes office, to determine whether or not the trusts he is to administer are or are not valid charitable trusts. [2]

[2] 43 Eliz. c. 4. The procedure under the statute was inappropriate to the primitive judicial machinery of the colony, and jurisdiction over such matters was exercised by the General Court.

For various proceedings with reference to the Free School at Roxbury see 4 Mass. Colony Records (Shurtleff, 1854), part II, pp. 434-435, 441, 455-458; part IV, pp. 5, 6, 22.

HISTORICAL NOTE.

In 1671 an act was passed by the General Court by which this jurisdiction was transferred to the County Courts. "It is ordered by this Court and the Authority thereof; that all Gifts and Legacies given and bequeathed to the Colledge, Schools of Learning, or any other Publick use; shall be truely and faithfully disposed of according to the true and declared intent of the Donors. And all and every Person or Persons betrusted to receive or improve any such Guifts or Legacies, shall be liable from time to time to give account of their disposal and management thereof to the County Court of that Shire where they dwell, and where such Estate shall lye, who are hereby impowred to require the same where need shall be, and to appoint Feoffes of trust to settle and manage the same according to the will of the Donors." Colonial Laws of Massachusetts (Whitmore, 1890), p. 9 of General Laws and Liberties, revised by Edward Rawson, 1672; 4 Mass. Colony Records, part II, p. 488.

Upon the repeal of the Colony Charter in 1685 the President and Council took cognizance of charitable trusts.

Under the Province Charter the act of the General Court establishing a court of chancery was disallowed by the King and Council; and thereafter such jurisdiction over charities as existed at all was exercised by the General Court, through resolves and acts of incorporation, until equity

§ 2. The English statute of charitable uses, enacted in 1601 in declaration of the common law, in so far as it recognized and defined charitable uses, became upon the settlement of New England a part of our common law. This act, entitled "An Act to Redress the Misemployment of Lands, Goods, and Stocks of Money Heretofore Given to Charitable Uses," recited that "lands, tenements, rent, annuities, profits, hereditaments, goods, chattels, money, and stocks of money . . . heretofore given, limited, appointed, and assigned as well by the Queen's most Excellent Majesty and her most noble progenitors, as by sundry other well-disposed persons, some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or

jurisdiction was conferred upon the Supreme Court by statute of 1817, c. 67. But lack of chancery jurisdiction during this period did not affect the validity of charitable trusts when sufficient in form.

For the history of the jurisdiction over charities in Massachusetts see Quincy's Reports, pp. 537, 538, note. Opinions by Shaw, C.J., in *Hadley* v. *Hopkins Academy*, 14 Pick. 240; in *Earle* v. *Wood*, 8 Cush. p. 445, and in *Going* v. *Emery*, 16 Pick. pp. 115-117. Opinions by Gray, J., in *Drury* v. *Natick*, 10 Allen, pp. 180, 181, and in *Jackson* v. *Phillips*, 14 Allen, 539, 591.

redemption of prisoners and captives, and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes, . . . [had] not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same." And it provided that, in order to redress such abuses in the future, commissioners should go into the several counties with power to seek out and enforce the performance of such trusts.

§ 3. Formerly the statute of charitable uses was narrowly construed in Massachusetts, and only those uses enumerated in it were held charitable.[3] But in the case of *Drury* v. *Natick*,[4] in 1865, the court

[3] *Sanderson* v. *White*, 18 Pick. 328, 333.

[4] 10 Allen, 169:

The aim of the statute is "to show by familiar examples what classes or kinds of uses were considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than to enumerate or specify all the purposes which would fall within the scope and intent of the statute, much less every possible mode of carrying them out. . . . [The] courts are to be guided not by its letter, but by its manifest spirit and reason, and are to consider not what uses are within its words, but what are embraced in its meaning and purpose. . . . The apparently inconsistent statement of Chief Justice SHAW in *Sanderson* v. *White*, . . . that . . . 'all gifts are to be deemed charitable which are enumerated in that statute as such, and none other,' is shown by referring to the case of *Morice* v. *Bishop of Durham* [10 Ves. 521], which he cites in its support, to have omitted, either by accident, or as immaterial to the case then under consideration, the words added by Sir William Grant, . . . 'or which by analogies are deemed within its spirit and intendment.'" GRAY, J., at pages 177-178, 182.

adopted the broader view that the list of charitable objects contained in the statute was not meant to be complete, but merely to furnish examples of those kinds of uses which were regarded as so beneficial to the public welfare as to deserve special favor from the courts.

§ 4. Accordingly the terms "charity" or "charitable" as applied to these trusts have a much wider meaning than when used in other connections. They are not confined to trusts for the benefit of the poor, but embrace any uses that are of common and public benefit.[5] Chief Justice GRAY, in 1867, defined a charity as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."[6] As applied to concrete facts the extent of the term can be determined only by a review of the decisions. For this purpose the cases may conveniently be divided into four main groups, according to the nature of the gift.

[5] "The word '*charitable*' has a distinct legal meaning, derived from the St. of 43 Eliz. c. 4, from the construction given to it in the definition of its objects of charity, and from the application of the statute to other uses which are not included in those there enumerated, but which come within its spirit by analogy." DEVENS, J., in *White* v. *Ditson*, 140 Mass. 351, 352.

[6] *Jackson* v. *Phillips*, 14 Allen, 539, 556.

§ 5. In the first group may be placed gifts that are charitable in the ordinary sense of the word. Among such are gifts to establish and maintain homes for persons of all sorts and conditions who may be in need of assistance, such as old men and women, sailors, orphans, and working girls;[7] asylums and farm schools;[8] hospitals and institutions for the blind, deaf, and dumb;[9] gifts in trust to be applied, independently of any institution, to the support of various classes of persons in need, such as widows, children, old people,[10] spinsters of a certain town,[11] soldiers and sailors disabled in the service,[12] families of workmen on strike,[13] widows and orphans of deceased clergymen, and fugitive slaves.[14] Sometimes the purposes are stated specifically, as, for example, the founding of a colony of freedmen on the west coast of Africa,[15] or the purchase of groceries for

[7] *Odell* v. *Odell*, 10 Allen, 1; *Gooch* v. *Association for Relief of Aged Females*, 109 Mass. 558; *Faulkner* v. *National Sailors' Home*, 155 Mass. 458; *Sherman* v. *Congregational Missionary Society*, 176 Mass. 349; *Amory* v. *Attorney General*, 179 Mass. 89; *Franklin Square House* v. *City of Boston*, 188 Mass. 409.

[8] *Minot* v. *Boston Asylum*, 7 Met. 416.

[9] *Baker* v. *Clarke Institution*, 110 Mass. 88; *Weeks* v. *Hobson*, 150 Mass. 377; *Burbank* v. *Burbank*, 152 Mass. 254; *Porter* v. *Howe*, 173 Mass. 521; *Marsh* v. *Renton*, 99 Mass. 132; *Society for Promoting Theological Education* v. *Attorney General*, 135 Mass. 285; *Minns* v. *Billings*, 183 Mass. 126.

[10] *Northampton* v. *Smith*, 11 Met. 390; *Sohier* v. *Burr*, 127 Mass. 221; *Suter* v. *Hilliard*, 132 Mass. 412; *Weston* v. *Amesbury*, 173 Mass. 81.

[11] *Fellows* v. *Miner*, 119 Mass. 541.

[12] *Holmes* v. *Coates*, 159 Mass. 226.

[13] *Attorney General* v. *Bedard*, 218 Mass. 378, 385.

[14] *Jackson* v. *Phillips*, 14 Allen, 539.

[15] *Burbank* v. *Whitney*, 24 Pick. 146.

the sick,[16] or fuel to be sold at cost to the poor;[17] to provide excursions for poor children, etc.[18] In other cases the purposes are expressed in general terms, as, for example, "for the relief of the poor."[19] Such gifts are valid, whether to be applied within or outside the commonwealth.[20] Validity of a charitable gift under a Massachusetts will is determined by Massachusetts law.[21]

§ 6. Sometimes the selection of the objects and method of application of the gift is left wholly or in part to the trustee. For example, the trustee may be directed generally to devote the property "to charitable objects"[22] or to "such charities as he may think most useful or efficient."[23] The gift may be general in terms and become definite and specific only upon the exercise by the trustee of the power of selection. If the gift is confined to purposes that are charitable in the legal sense, indefinite range in the choice of objects may be given the trustee.[24] Power may be given

[16] *Washburn* v. *Sewall*, 9 Met. 280.

[17] *Webb* v. *Neal*, 5 Allen, 575.

[18] *Loring* v. *Wilson*, 174 Mass. 132.

[19] *Attorney General* v. *Trinity Church*, 9 Allen, 422; *Attorney General* v. *Old South Society*, 13 Allen, 474; *Marsh* v. *Renton*, 99 Mass. 132; *Darcy* v. *Kelley*, 153 Mass. 433.

[20] *Bartlet* v. *King*, 12 Mass. 537, 540; *Thorp* v. *Lund*, 227 Mass. 474.

[21] *Fellows* v. *Miner*, 119 Mass. 541.

[22] *Brown* v. *Kelsey*, 2 Cush. 243; *Winslow* v. *Cummings*, 3 Cush. 358.

[23] *Wells* v. *Doane*, 3 Gray, 201; *White* v. *Ditson*, 140 Mass. 351; *Minot* v. *Baker*, 147 Mass. 348; *Minns* v. *Billings*, 183 Mass. 126; *Howard* v. *Howard*, 227 Mass. 395.

[24] *Rotch* v. *Emerson*, 105 Mass. 431, 434.

Adding the letters "etc." to a designation of charitable purposes has been held not to enlarge the scope of the gift

him to nominate others to make the selection.[25] On the other hand, vague statements indicating an intention to carry out public works for the benefit of a town, without specifying the nature of the works contemplated or imposing any obligation upon the trustees, will not impress the residuary estate with a trust for public charitable purposes generally so as to revoke or reduce a prior residuary gift.[26]

§ 7. If, however, the trustee has the alternative of applying the gift as well to objects which are not charitable as to objects which are charitable, the gift will fail.[27] Thus, where trustees were directed to distribute a fund among "charitable or worthy" objects, and particularly to give to any relative of the testator whom he had overlooked without reason, the whole trust was held void,[28] for the term "worthy" is broader than "charitable" and may include objects not recognized in law as charities. On similar reasoning, trusts for "benevolent" or "deserving" objects have been held invalid,[29] for, although chari-

to include purposes not charitable. *Schouler, Petitioner*, 134 Mass. 426, 427.

[25] *Gill* v. *Attorney General*, 197 Mass. 232.

[26] *Howard* v. *Howard*, 227 Mass. 395.

[27] *Chase* v. *Dickey*, 212 Mass. 555, 565, and cases cited.

[28] *Minot* v. *Attorney General*, 189 Mass. 176.

If the non-charitable alternative happens to be illegal, the trust for the charitable alternative will be sustained. *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 195-196.

[29] *Chamberlain* v. *Stearns*, 111 Mass. 267; *Nichols* v. *Allen*, 130 Mass. 211.

"The word 'benevolent,' of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity; but also any acts dictated by kindness, good will or a disposition to do good, the objects of

table objects are benevolent and doubtless deserving, it does not follow that all deserving and benevolent objects are charitable. These cases must not be understood as establishing a hard and fast rule of construction requiring the use of the word "charitable" to make valid a general indefinite gift to charity. If "benevolent" or "deserving" is used in conjunction with "charitable," or with words that clearly designate a strictly charitable object, so that they can be construed as synonyms of "charitable," the trust will be sustained.[30] "Benevolent" or "de-

which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense." GRAY, J., in *Chamberlain* v. *Stearns*, 111 Mass. 267, 268.

"'Deserving' denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses." GRAY, C.J., in *Nichols* v. *Allen*, 130 Mass. 211, 218.

[30] In *Saltonstall* v. *Sanders*, 11 Allen, 446, 470, a gift to trustees to be applied to "the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of *benevolence or charity*, public or private, or temperance, or for the education of deserving youths," was held to be a valid charitable trust.

In *Rotch* v. *Emerson*, 105 Mass. 431, 433, the court upheld as a charity a trust "for the promotion of agricultural or horticultural improvements, *or other philosophical or philanthropic purposes*."

In *Suter* v. *Hilliard*, 132 Mass. 412, the trustees were directed to assist "charitable, benevolent, religious, literary and scientific" objects, *or any of them*, deserving such assistance; and in *Weber* v. *Bryant*, 161 Mass. 400, to apply the trust funds to "objects and purposes of *benevolence or charity*, public or private, including educational or charitable institutions, and the relief of individual need."

serving'' in such a case is construed as merely repeating, without enlarging, the idea expressed by ''charitable,'' or as defining and limiting the nature of the charity intended. So construed the instrument does not give the trustee power to apply the fund to objects that are not charities in the legal sense, and the trust is valid. [31] The question is one of intent. Did the giver mean the trustee to have power to apply the gift to other than strictly charitable objects? If he did not, the gift can be carried out; if he did, it will fail.

§ 8. Gifts for literary or educational purposes may be classed in a second group. Common examples are the founding of public schools and academies, the building of schoolhouses, establishment of free libraries and museums; [32] providing courses of free lec-

"If the words used are capable of either of two significations, in one of which they may take effect, while the other, if adopted, will render the bequest illegal or inoperative for any cause, the former is assumed to be according to the intention of the testator." WELLS, J., in *Rotch* v. *Emerson*, 105 Mass. 431, 433.

See also *St. Paul's Church* v. *Attorney General*, 164 Mass. 188.

[31] *Saltonstall* v. *Sanders*, 11 Allen, 446, 470.

"The terms used are not to be measured separately, but each is to be considered in its relation to the entire provision, and the general meaning of each restricted by its associations, and made subordinate to the main purpose." WELLS, J., in *Rotch* v. *Emerson*, 105 Mass. 431, 433.

[32] *First Parish* v. *Cole*, 3 Pick. 232; *Hayden* v. *Stoughton*, 5 Pick. 528; *Sanderson* v. *White*, 18 Pick. 328; *Davis* v. *Barnstable*, 154 Mass. 224; *Richardson School Fund* v. *Dean*, 130 Mass. 242; *Phillips Academy* v. *King*, 12 Mass. 545; *Hadley* v. *Hopkins Academy*, 14 Pick. 240; *Quincy* v. *Attorney General*, 160 Mass. 431; *Tainter* v. *Clark*, 5 Allen, 66; *Drury* v. *Natick*, 10 Allen, 169; *Winthrop* v. *Attorney*

tures;[33] payment of schoolmaster's salaries; endowment of professorships;[34] furnishing medals or scholarships, pecuniary aid to needy students,[35] and encouragement of research by giving prizes for discoveries.[36] In some trusts that have been before the court the purpose of the gift was stated to be to encourage education generally. In others its application was confined to special branches of science or art, such as the founding and maintenance of schools of languages, mathematics, music, drawing, divinity, agriculture, navigation, and useful industries;[37] the founding of professorships of physical science, archæology and ethnology, physiology and anatomy;[38] the establishment of model and experimental farms for students of agriculture;[39] or the preservation of historic buildings and works, and other antiquities.[40]

General, 128 Mass. 258; *Cary Library* v. *Bliss*, 151 Mass. 364; *Bartlett, Petitioner*, 163 Mass. 509; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280.

[33] *Lowell, Appellant*, 22 Pick. 215.

[34] *Dexter* v. *Harvard College*, 176 Mass. 192.

[35] *Bartlett, Petitioner*, 163 Mass. 509; *Dexter* v. *Harvard College*, 176 Mass. 192; *Society for Promoting Theological Education* v. *Attorney General*, 135 Mass. 285.

[36] *Rotch* v. *Emerson*, 105 Mass. 431; *American Academy* v. *Harvard College*, 12 Gray, 582.

[37] *Bartlett, Petitioner*, 163 Mass. 509; *Stacy* v. *Lyon*, 3 Pick. 390, 391; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280; *Harvard College* v. *Theological Education Society*, 3 Gray, 280; *Northampton* v. *Smith*, 11 Met. 390.

[38] *American Academy* v. *Harvard College*, 12 Gray, 582, 588; *Winthrop* v. *Attorney General*, 128 Mass. 258; *Dexter* v. *Harvard College*, 176 Mass. 192.

[39] *Northampton* v. *Smith*, 11 Met. 390; *Second Society of Boxford* v. *Harriman*, 125 Mass. 321; *Sears* v. *Chapman*, 158 Mass. 400.

[40] *Winthrop* v. *Attorney General*, 128 Mass. 258; *Molly Varnum Chapter* v. *Lowell*, 204 Mass. 487.

The matter of practical usefulness is of little consequence if the purpose of the gift is charitable in legal contemplation.[41]

§ 9. Societies of chosen members engaged in historical research may qualify as valid public charities if the work they are engaged in is of general public benefit. The Colonial Society of Massachusetts, the Massachusetts Historical Society, The Bostonian Society, and similar societies which, though of private membership, exist for the purpose of historical research, and give the benefit of their work to the public through free distribution of their publications among libraries, have been held public charities. The Boston Athenæum is also a public charity; for, though its membership is limited, its library and collections are sufficiently accessible to the general public to make them of public benefit.[42] Societies to perpetuate the memory of those who have rendered notable public service, by preserving historical landmarks, relics,

[41] In *Tainter* v. *Clark*, 5 Allen, 66, 67, a trust was sustained to maintain a school "to be taught by a female or females, wherein no book of instruction is to be used to teach except spelling books and the Bible, which said school is to be called the 'Bible School. or the New Testament sought out.'"

[42] *Minns* v. *Billings*, 183 Mass. 126. In this case trustees having the selection of charitable objects among which a fund was to be distributed selected 126 charitable objects and institutions and filed a bill in equity for instructions as to whether the objects selected were charities. This list is not contained in the official report. but appears in the petition, together with a descriptive statement of the purpose of each institution; and can be seen among the bound volumes of records in the Boston Social Law Library.

See below, § 22.

documents, etc., have been held good charities; for they encourage "love of country and respect for our civil institutions," both of which tend to raise the standard of citizenship and thereby advance the public good.[43]

§ 10. Trusts for religious uses form a third group. Among such are gifts to found churches,[44] build chapels,[45] support ministers,[46] establish Sunday schools,[47] and divinity schools,[48] and promote missionary work at home or abroad.[49] The uses may be prescribed, as, for example, a gift of land for a parsonage;[50] money for a Sunday-school library,[51] a gift *in trust* for the care of graves, monuments, or burial lots in public or private cemeteries,[52] for

[43] *Molly Varnum Chapter* v. *Lowell*, 204 Mass. 487, 494. *Thorp* v. *Lund*, 227 Mass. 474.

[44] *Hawes Place Society* v. *Trustees of Hawes Fund*, 5 Cush. 454; *Crawford* v. *Nies*, 224 Mass. 474, 485.

[45] *Bartlett, Petitioner*, 163 Mass. 509; *Teele* v. *Bishop of Derry*, 168 Mass. 341.

[46] *Brown* v. *Kelsey*, 2 Cush. 243; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Bullard* v. *Chandler*, 149 Mass. 532; *Bullard* v. *Shirley*, 153 Mass. 559; *Bartlett, Petitioner*, 163 Mass. 509.

[47] *Morville* v. *Fowle*, 144 Mass. 109.

[48] *Phillips Academy* v. *King*, 12 Mass. 545; *Harvard College* v. *Theological Education Society*, 3 Gray, 280.

[49] *Bartlet* v. *King*, 12 Mass. 537; *Odell* v. *Odell*, 10 Allen, 1; *Fairbanks* v. *Lamson*, 99 Mass. 533; *Hinckley* v. *Thatcher*, 139 Mass. 477.

[50] *Brattle Sq. Church* v. *Grant*, 3 Gray, 142.

[51] *Fairbanks* v. *Lamson*, 99 Mass. 533; *Bartlett, Petitioner*, 163 Mass. 509.

[52] *Dexter* v. *Gardner*, 7 Allen, 243; *Fellows* v. *Miner*, 119 Mass. 541; *Green* v. *Hogan*, 153 Mass. 462; Revised Laws, c. 78, § 18.

But a gift outright as distinguished from a trust, for the permanent care and beautifying of a burial place, is not a

masses,[53] sacred music, and courses of sermons.[54] Or religious purposes may be expressed in more general terms, as, for example, "to the cause of Christ" or the "diffusion of Christian principles."[55] The validity of the gift is in no way affected by questions of creed or sect.[56] In this class are gifts to societies organized for religious charitable purposes, such as American Board of Foreign Missions,[57] home missionary societies, and societies to aid struggling congregations;[58] societies to aid poor students of theology; temperance societies,[59] and societies for the religious and moral uplifting of various classes of persons popularly supposed to be in need of it.[60] Gifts to

public charity, and is void at common law as a perpetuity. *Bates* v. *Bates*, 134 Mass. 110; *Morse* v. *Natick*, 176 Mass. 510.

[53] *Schouler, Petitioner*, 134 Mass. 426.

[54] *St. Paul's Church* v. *Attorney General*, 164 Mass. 188; *Attorney General* v. *Trinity Church*, 9 Allen, 422.

[55] *Going* v. *Emery*, 16 Pick. 107; *Morville* v. *Fowle*, 144 Mass. 109.

[56] Trusts for Friends and Quakers are good charities. *First Society* v. *Fitch*, 8 Gray, 421; *Earle* v. *Wood*, 8 Cush. 430; *Dexter* v. *Gardner*, 7 Allen, 243; *Attorney General* v. *Briggs*, 164 Mass. 561.

Whether a gift for the benefit of Christian Science is a religious use has not yet been decided in Massachusetts. *Chase* v. *Dickey*, 212 Mass. 555, 568. Such a trust has been sustained in New Hampshire. *Glover* v. *Baker*, 83 Atl. Rep. 916, 930-934.

[57] *Bartlet* v. *King*, 12 Mass. 537; *Bartlett* v. *Nye*, 4 Met. 378.

[58] *Burbank* v. *Whitney*, 24 Pick. 146; *Healy* v. *Reed*, 153 Mass. 197.

[59] *Tucker* v. *Seaman's Aid Society*, 7 Met. 188.

[60] *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Winslow* v. *Cummings*, 3 Cush. 358; *Faulkner* v. *National Sailors' Home*, 155 Mass. 458.

Young Men's and Women's Christian Associations have been sustained as charitable gifts, but it cannot be stated as a broad rule that all societies so named are valid public charities.[61] The character of every such institution depends on its particular purpose and its method of administration.[62]

§ 11. It was formerly held that gifts to a church or for the benefit of a particular congregation were not charitable, because, the right of attendance for worship being limited to pewholders, the individual beneficiaries were in effect definite and ascertained persons.[63] It was also held that a general church fund raised by contributions was not impressed with the character of a charity fund by the fact that one of its objects was relief of the poor.[64] But this doctrine has not been followed in the later decisions, and it is now settled that gifts to churches or congregations, or trusts for the support of churches in their religious worship, are valid charities.[65]

[61] *Porter* v. *Howe*, 173 Mass. 521-527.

[62] *Little* v. *Newburyport*, 210 Mass. 414.

[63] *Attorney General* v. *Federal St. Meeting-house*, 3 Gray, 1.

[64] *Attorney General* v. *Old South Society*, 13 Allen, 474.

[65] *McAlister* v. *Burgess*, 161 Mass. 269; *St. Paul's Church* v. *Attorney General*, 164 Mass. 188-197; *Osgood* v. *Rogers*, 186 Mass. 238, 240; *Sears* v. *Attorney General*, 193 Mass. 551, 555.

In *Old South Society* v. *Crocker*, 119 Mass. 1-28, the majority of the members of the Corporation of the Old South Church petitioned for leave to sell the old meeting-house, which had become, by reason of the changed character of its surroundings, unfit for church purposes. This meeting-house stood upon land which Mrs. Mary Norton in 1669 had conveyed to certain persons named, and to such as they should associate with themselves in trust to erect "a house

§ 12. In the fourth group may be classed trusts for miscellaneous uses which are of public benefit but

for their assembling themselves together publiquely to worship God." The minority of the members of the corporation contended that the lands had been given for this purpose alone, and that, if put to any other use, they would revert to Mrs. Norton's heirs.

Simultaneously an information was brought by the attorney general, on the ground that the gift of the land was to a charitable use, and that a sale of it would be a violation of the trust. The court held that the deed had created no public charity; that every person entitled to the enjoyment of its benefits was an ascertained person, because the legal right to the enjoyment of the gift was limited by the donor to those who should become associated with her grantees and their successors, thus constituting a poll-parish, or religious society. And, at pp. 24, 25, WELLS, J., said, in his opinion: "Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy, in accordance with the usual practice of all churches, . . . does not thereby become a public charity."

In *Attorney General* v. *Proprietors of Federal Street Meeting-house*, 3 Gray, 1, SHAW, C.J., said, in his opinion, at p. 50: "It was urged in argument that it is usual in all Christian societies and places of public worship, that all persons who choose may in fact attend, and that it is usual to set apart free seats, and so the public are benefited. The fact is undoubtedly so, that persons who desire it may usually attend; but it is matter of courtesy, and not of right. On the contrary, any religious society, unless formed under some unusual terms, may withhold this courtesy, and close their doors, or admit whom they please only; and circumstances may be easily imagined in which it would be necessary to their peace and order that they should exercise such right. Were it otherwise, and were the occasional permission of all persons to enter churches, and listen to preachers, to be regarded as a public or general right, every parish, territorial or poll, every society formed by the incorporation of proprietors or pewholders, must be considered as a public charitable institution, to be regulated and controlled by an information filed by the at-

somewhat farther removed from what are commonly thought of as charities. In this class are trusts for

torney general at the relation of any person desirous of attending the religious services of such societies."

"The very term *church* imports an organization for religious purposes; and property given to it *eo nomine*, in the absence of all declaration of trust or use, must, by necessary implication, be intended to be given to promote the purposes for which a church is instituted; the most prominent of which is the public worship of God." PARKER, C.J., in *Baker* v. *Fales*, 16 Mass. 495.

In *McAlister* v. *Burgess*, 161 Mass. 269, a gift by will to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of Boston and the vicinity, was upheld as a gift upon a charitable use.

After quoting *Baker* v. *Fales*, the court, BARKER, J., said, at p. 271: "It is a matter of common knowledge, that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons; and there can be no question that an indefinite number of persons are constantly benefited by having their minds and hearts brought under the influence of religion by poor churches of the city of Boston and vicinity. . . . There seems to be no reason . . . why a gift of property to one or more churches should not be held a charitable gift, and none why, if it is given in trust, the trust should not be held a trust for a public charity, and not subject to the rule of law against perpetuities." And, at pp. 271-272: "The plaintiffs contend, however, that it is settled by a course of decisions that in this Commonwealth a church is a voluntary association of such a nature that a gift for its benefit cannot be upheld as a public charity, and they cite as authority for this contention the cases of *Attorney General* v. *Federal Street Meeting-House*, 3 Gray, 1; *Attorney General* v. *Trinity Church*, 9 Allen, 422; *Attorney General* v. *Old South Society*, 13 Allen, 474; and *Old South Society* v. *Crocker*, 119 Mass. 1."

The court then distinguished these cases on the following grounds: the first, that the property had been given to the proprietors of a meeting-house, and not to the church as such; the second, that the only question raised was as to

the laying out of public parks and gardens;[66] for the improvement of city streets and public grounds by the planting of shade trees; and for the purchase of wood lands to be laid out with paths and drives.[67] Among the charitable uses for which Dr. Franklin left his estate were the erection of fortifications, bridges, aqueducts, public buildings, paths, pavements, "or whatever may make living in the

whether the trustees had been guilty of a breach of trust; it being decided incidentally that two of the uses declared—relief of the poor and preaching of Lenten sermons—were good charitable uses; the other, that part of the fund be paid annually "to the church," not being passed upon; the third, that the only question decided was that the sacramental contributions of a religious society were not impressed with the character of a public charity; and the fourth, as follows: "In *Old South Society* v. *Crocker*, . . . the two conveyances by Madame Norton were not to a church, but to certain persons named and their associates, and the purpose of the conveyance was not for general church purposes, but for the erection of a meeting-house and of a dwelling for the minister, while her devise, although to the 'Third Church of Christ in Boston,' was not for the general purposes of the church, but 'for the use of the ministry in the said church successively forever.' While it was held that no public charity was created by the deeds or the devise, it was also held that a trust not obnoxious to the rule of law against perpetuities was created by them. The case is certainly not an authority for the position that a gift for the benefit of a church, *simpliciter*, is not a public charity, and is an authority that a devise to a church for the use of the ministry in the church forever is a good devise. In our opinion, a gift to a church, without restrictions as to the use to be made of the property, is a gift to be applied for the promotion of public worship and of religious instruction, which must necessarily influence other than church members, and, if in trust, has all the elements of a public charity."

[66] *Burbank* v. *Burbank*, 152 Mass. 254.

[67] *Bartlett, Petitioner*, 163 Mass. 509.

Town more convenient to its People and render it more agreeable to strangers, resorting thither for Health or a temporary residence."[68] Gifts toward payment of the national debt have been held valid in England, and undoubtedly any gift to the state or national government for the general public welfare would be sustained here.[69] Gifts to establish a life-saving station on a dangerous part of the coast[70] and to aid in "suppressing the rebellion and restoring the Union" have been held to be good charities.[71] In the recent case of *Thorp* v. *Lund*[72] a gift for "such national or philanthropic purpose" in Norway as the testatrix's daughter might appoint by will was held to be a good charity. Appropriations from the fund to promote efficiency in the army, to maintain a military company and teach shooting in the army, and for the production of national plays to stimulate patriotism were sustained as properly within the power. In the opinion, RUGG, C.J., quoted, from *Ould* v. *Washington Hospital,* 95 U.S. 303, Justice SWAYNE's definition of a charity: "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." Speaking of the uses to which the fund in question had been put, the chief justice said: "a gift for a general

[68] *City of Boston* v. *Doyle*, 184 Mass. 373.
[69] *Collector of Taxes* v. *Oldfield*, 219 Mass. 374, 377.
[70] *Richardson* v. *Mullery*, 200 Mass. 247.
[71] *Dickson* v. *United States*, 125 Mass. 311, 315.
[72] *Thorp* v. *Lund*, 227 Mass. 474; and cases cited. , 479

public utility is not necessarily a charity. But a gift for a purpose confined to that which is national in the sense that it might be supported at public expense and by general taxation is a close approach to a charity. . . . 'philanthropic' is almost if not quite synonymous with the word 'charity.' " The World's Peace Foundation, an organization for "educating the people of all nations to a full knowledge of the waste and destructiveness of war . . . and to promote international justice and the brotherhood of man" and generally "to promote peace and good will among all mankind," is a public charity.[73]

§ 13. The benefit need not be confined to human beings. Societies for the prevention of cruelty to animals and homes for stray animals are public charities.[74]

§ 14. A trust to bring about a change in existing laws, without relation to any charitable object, cannot be sustained as a charitable trust. Thus a trust to aid in securing legislation giving women the right to vote, or civil and property rights on an equality with men, is bad. Upsetting or changing the laws to meet the desires of any party is not a charitable use, and

Justice SWAYNE'S definition was adopted from the argument of Mr. Binney in *Vidal* v. *Girard's Executors*, 2 How. 128 (decided in 1844), which presents in a remarkable way the conception of charitable trusts and the historical development of the law respecting them.

[73] *Parkhurst* v. *Treasurer & Receiver General*, 228 Mass. 196.

[74] *Mass. Society* v. *Boston*, 142 Mass. 24; *Minns* v. *Billings*, 183 Mass. 126, 130; *University of London* v. *Yarrow*, 23 Beav. 159.

A gift for a drinking-trough for birds and animals is a good charity. *Coleman's Estate*, 167 Cal. 212.

the court will not consider the advantages or disadvantages of the desired change.[75] But if the purpose which the change seeks to accomplish is something which in itself is regarded as charitable, the fact that it requires a change of law does not vitiate the gift. Thus a trust for the purpose of creating "a public sentiment that will put an end to negro slavery" was sustained, being likened to "the relief or redemption of prisoners and captives" in the statute of charitable uses, and slavery being contrary to natural right.[76] The World's Peace Foundation, a corporation established to promote international peace, is a public charity. The attainment of its object must involve changes in existing laws; but this is merely incidental, and does not affect the validity of a gift to be applied in promoting its objects.[77]

§ 15. Mutual-benefit associations established for the assistance of their own sick and disabled members and supported by compulsory assessments are not public charities. Such assessments are in the nature of premiums for insurance against sickness and accidents, and lack the character of absolute gifts for the benefit of the public or of a class.[78] But a permanent

[75] *Jackson* v. *Phillips*, 14 Allen, 539, 571.

[76] *Jackson* v. *Phillips*, 14 Allen, 539, 558, 564.

[77] *Parkhurst* v. *Treasurer & Receiver General*, 228 Mass. 196.

[78] *Coe* v. *Washington Mills*, 149 Mass. 543; *Young Men's Temperance Society* v. *Fall River*, 160 Mass. 409.

The Boston Protective Department, a corporation existing for the purpose of saving property at fires, and supported by contributions from insurance companies, is not a charity, though its work is of public benefit. *Newcomb* v. *Boston Protective Department*, 151 Mass. 215.

fund derived from voluntary gifts for the purpose of rendering charitable assistance to members of mutual-benefit associations, the management of the fund being left wholly to its trustees, is a good charitable fund. Though its benefits are limited to members of the association, it does not thereby lose its public character, for the beneficiaries form a class, the individual members of which, as time goes on, are indefinite.[79]

§ 16. A public charitable institution is not rendered non-charitable by charging those who resort to it a reasonable fee. Students at college may be required to pay for tuition, and inmates of a hospital or a home for medical attendance and board.[80] A charitable institution that runs a wood-yard to give work to discharged convicts may sell its product to raise money for its maintenance.[81] That which constitutes a charity is that it does not furnish these things for a profit.[82]

§ 17. If, however, the principal object of the institution is pecuniary gain in any form for its incorporators or members, it is not a public charity, even though it may indirectly serve educational or charitable ends. The fact that an institution is engaged in work of a nature regarded as charitable does not

[79] *Minns* v. *Billings*, 183 Mass. 126, 128-129; *Masonic Charity Trust* v. *Boston*, 201 Mass. 320.

[80] *McDonald* v. *Mass. General Hospital*, 120 Mass. 432, 435; *Thornton* v. *Franklin Square House*, 200 Mass. 465; *Sherman* v. *Congregational Missionary Society*, 176 Mass. 349.

[81] *Conklin* v. *John Howard Industrial Home*, 224 Mass. 222.

[82] *Gooch* v. *Association for Aged Females*, 109 Mass. 558, 567.

give it the character of a charitable institution if it is primarily a money-making enterprise.[83] The character of an institution is determined from its purposes as stated in its charter or instrument of organization, and the fact that it sometimes expends funds in charity is of no consequence if that is not the main object of its existence.[84]

§ 18. A good charitable gift is not affected by being made subject to a condition requiring expenditure of money by the donee. So, where money is given to a town for public charitable purposes, the donor may prescribe as a condition of the gift that the town shall pay the operating expenses of the charity.[85] A condition may be annexed to a gift of land, that it shall never be sold;[86] or to a gift of a fund, that income at a fixed rate shall be guaranteed by the trustee.[87] If the donee fails to perform the condition, it forfeits its right to the gift.[88] If the money has been paid over, the donee can be made to account and refund it.[89] Directions creating a subsidiary trust for maintenance and upkeep of real estate left on a charitable trust, or imposing such an

[83] *Stratton* v. *Physio-Medical College*, 149 Mass. 505.

See also *Newcomb* v. *Boston Protective Department*, 151 Mass. 215, 217.

[84] *Donnelly* v. *Boston Catholic Cemetery*, 146 Mass. 163, 167; *In re Altman*, 149 N.Y. Supp. 601; *In re Loeb*, 152 N.Y. Supp. 879.

[85] *Drury* v. *Natick*, 10 Allen, 169, 183.

[86] *Bell* v. *Nesmith*, 217 Mass. 254.

Cf. § 46, below.

[87] *Bell* v. *Nesmith*, 217 Mass. 254.

[88] *American Colonization Society* v. *Smith Charities*, 2 Allen, 302.

[89] *Morville* v. *American Tract Society*, 123 Mass. 129.

obligation as a condition of the principal gift, do not create in perpetuity a private trust to run along with the use of the real estate for the charitable purpose, thereby causing both trusts to fail. Such directions relate merely to details of administration, and, if impossible of performance, do not affect the main trust.[90]

§ 19. In this state there is no limit to the amount that may be left to charity by will, save only the statutory protection of the rights of a surviving husband or wife.[91] But there are limits to the amounts of property that certain classes of charitable institutions can hold. The property holdings of a charitable or literary corporation organized under general law are limited to $1,500,000;[92] but this does not limit the holdings of corporations whose charters authorize them to hold larger amounts. If corporations are created by special act, limits are generally set to the amount they may hold.[93] Gifts in excess of that amount, whether by will or by deed, are, however, good against every one but the commonwealth. The heirs of the donor cannot challenge the gift, and objection may be waived by the commonwealth by legislation to fit the case.[94]

§ 20. If an estate is insufficient to pay all legacies in full, charitable and other legacies will abate

[90] *Howard* v. *Howard*, 227 Mass. 395; *Chase* v. *Dickey*, 212 Mass. 555, 565.

[91] *Healy* v. *Reed*, 153 Mass. 197; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 282.

[92] Revised Laws, c. 125, §§ 2, 8; Acts of 1915, c. 209.

[93] See briefs in *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, in Boston Social Law Library.

[94] *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 289.

equally. Charitable gifts are entitled to no preference in this respect.[95]

[95] *Winslow* v. *Cummings*, 3 Cush. 358, 365; *Porter* v. *Howe*, 173 Mass. 521, 527; *Boston Safe Deposit & Trust Co.* v. *Plummer*, 142 Mass. 257, 264.

CHAPTER II

PECULIARITIES OF CHARITY TRUSTS

SYNOPSIS

§§ 21-24. (*a*) Indefiniteness.
25-28. (*b*) Duration—Rule against perpetuities.
29-30. (*c*) Directions for accumulation.
31-35. (*d*) Administration *cy-pres*.

(*a*) *Indefiniteness*

§ 21. Indefiniteness or a failure clearly to nominate beneficiaries is fatal to an ordinary trust. If no *cestuis que trustent* are named, no equitable rights are created. There is no one who can enforce the execution of the trust, and the property passes by resulting trust to the donor's heirs or next of kin. But if the object of the trust is charitable, indefiniteness is not fatal to it. On the contrary, indefiniteness is an essential feature of a charity trust. Gifts for the benefit of the poor, to found free schools, to say masses, spread religion, build libraries and public works, establish memorials, or for any charitable purpose to be selected by the trustees, are all valid charitable gifts. No individual has any rights in them; no man can come before the court and demand execution of them in his own right. Nevertheless such trusts will be enforced by a court of equity at the suggestion of the attorney general, and the property is beyond the reach of the donor's heirs.

§ 22. It is essential that at the time the trust is created the identity of the individuals who will receive the benefits of it be uncertain. If they are mentioned by name or so designated as to be in reality ascertained individuals, even though they may be

fitting objects of charity, the trust will not have the character of a charity trust, and, unless it is enforceable as a non-charitable trust for individuals, it will fail. Thus a trust for any of the donor's descendants who may be in need, or for certain poor families named or identified in the bequest, is bad. [1] If, however, the gift is public in the sense that those who will receive its benefits are members of an indefinite class, the size or extent of the class is of no consequence. It may take in all mankind or a race, [2] or be limited to persons of a certain status or occupation, the residents of a certain locality—as, for example, the poor of a town, widows and orphans of pastors of a church, families of striking workmen, etc. [3] No distinction is made between natural and artificial classes—that is, between classes whose members are determined by force of circumstances, such as race or deformity, and those whose members become such by voluntary selection, as members of a particular church, religious belief, or occupation. [4]

§ 23. If a trust is of general public benefit, the donor may direct that certain individuals shall be

[1] *Kent* v. *Dunham*, 142 Mass. 216.

[2] *Nichols* v. *Allen*, 130 Mass. 211, 220; *Holmes* v. *Coates*, 159 Mass. 226.

[3] *Attorney General* v. *Goodell*, 180 Mass. 538; *Sears* v. *Attorney General*, 193 Mass. 551; *Attorney General* v. *Bedard*, 218 Mass. 378.

Cf. Gray, Rule against Perpetuities, appendix A, §§ 680-685.

In an English case a gift for the benefit of the ringers for the time being of a parish church, who shall ring a peal of bells on May 29 of each year to commemorate the restoration of monarchy, was held a good charity. *In re Pardoe*, [1906] 2 Ch. 184.

[4] *Norris* v. *Loomis*, 215 Mass. 344.

preferred as beneficiaries.[5] For example, property may be left in trust for the poor, with instructions that it be applied first to aid the donor's poor relations;[6] and in leaving funds to a college, the income to be used for general purposes, the donor may stipulate that primarily it shall be used for descendants of his who may be students at the institution.[7] Such a direction is a lawful right of the donor, and takes away nothing from the public character of his gift. A literary or historical association whose work entitles it to be considered a public charity, such as the Boston Athenæum, is not rendered less so by the fact that its members are afforded greater privileges than the general public.[8]

§ 24. Directions that the gift be administered privately do not affect its validity, provided its purposes are such as to give it the character of a public charity.[9] "'A good charitable use is 'public,' not in the sense that it must be executed openly and in pub-

[5] A gift does not "cease to be a charity because certain persons are named as of the class to be assisted, or even because provision is made that a preference shall be accorded them in the distribution of her bounty. When they are thus provided for as a part of the poor who are to receive the benefit of the donation, its public object and purpose continue, and it is still invested with the character of a public charity." DEVENS, J., in *Bullard* v. *Chandler*, 149 Mass. 532, 540.

[6] *Darcy* v. *Kelley*, 153 Mass. 433.
Cf. Gray, Rule against Perpetuities, § 683.

[7] *Dexter* v. *Harvard College*, 176 Mass. 192.

[8] *Minns* v. *Billings*, 183 Mass. 126, 128.

[9] In *Webb* v. *Neal*, 5 Allen, 575, a trust to supply fuel to the poor, with directions that this be done "in the most private manner possible" and the names of the recipients withheld from the public was held a good charitable trust.

lic; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefited may be private, and the charity may be distributed in private and by a private hand. It is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected."[10] An intention on the part of the donor that his gift serve as a memorial to himself or members of his family, even though that be the sole incentive to his gift, does not invalidate it if it has the essential elements of a charity.[11]

(b) *Duration*

§ 25. An important distinction between charitable trusts and trusts for individuals lies in the possible extent of their duration. A limitation to an individual which is inalienable and indestructible for a period that may exceed by twenty-one years the close of a life in being at its creation is void as a perpetuity. A limitation to a charitable use is not subject to this rule, but may remain inalienable forever.[12] So

[10] GRAY, J., in *Saltonstall* v. *Sanders*, 11 Allen, 446, 456.

In *Bullard* v. *Chandler*, 149 Mass. 532, a fund was left for the relief and comfort of the poor and unfortunate, with instructions that it be used "strictly for private charities." The gift was held charitable because it was to be devoted permanently to the relief of the poor. The fact that distribution was to be made in private and by private persons was immaterial.

[11] *Richardson* v. *Essex Institute*, 208 Mass. 311, 317.

[12] "No estate, legal or equitable, can be created by deed or will, to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being . . . and twenty-one years afterwards. . . . The reason of the rule is that to allow a contingent estate to

the statement is sometimes made that charitable trusts are not subject to the rule against perpetuities. In one sense this is correct; in another it is incorrect. The rule against perpetuities has a twofold operation. Its purpose is to prevent the creation of remote conditional estates; incidentally it prevents the creation of immediate estates which shall be inalienable and indestructible beyond a fixed period.[13] It might have been called the rule against remoteness more appropriately than the rule against perpetuities. A perpetuity is, strictly speaking, such an immediate, inalienable, perpetual estate; but, from the double aspect of the rule, the primary and secondary significance of the term have become interchanged. It is used of the future remote conditional limitation as well as of the immediate estate.[14]

§ 26. The statement that charity trusts are not subject to the rule against perpetuities is true in the

vest at a more remote period would tend to create a perpetuity by making the estate inalienable; for the title of the first taker would not be perfect, and until the happening of the contingency it could not be ascertained who was entitled, and so the estate could not be alienated, even, as has been said, if all mankind should join in the conveyance." GRAY, J., in *Odell* v. *Odell*, 10 Allen, 1, 5.

[13] Gray, Rule against Perpetuities, §§ 140, 589-601.

"But here . . . is the common confusion between perpetuity in the sense of inalienability, and perpetuity in the sense of remoteness. Property dedicated to a charity is inalienable necessarily; but there is no need of allowing a gift to charity to commence in the remote future. The prevention of property from inalienability is simply an incident of the Rule against Perpetuities. The true object of the rule is to restrain the creation of future conditional interests." *Ibid.* § 600.

[14] *Ibid.* §§ 140, 267.

sense that such trusts may endure forever;[15] for, inasmuch as no persons have any definite equitable rights in a trust for charity, no rights are created by such a trust that can be alienated.[16] A public or charitable trust may therefore be indefinite in duration.[17] But the statement is not true in the sense that a gift over to charity may take effect after a preceding gift upon the happening of an event that may not take place within the limit of a life or lives in being and twenty-one years.[18] A gift or trust for a charity upon the happening of a remote contingency after an immediate gift to or trust for an individual is void as certainly as is a remote conditional gift to an individual after a gift to another individual or to a charity.[19] The nature of the object does not affect the application of the rule.[20]

[15] In *Silsby* v. *Barlow*, 16 Gray, 329, a fund was left in trust for the support of a minister "while time shall last."

[16] Gray, Rule against Perpetuities, § 590; *Odell* v. *Odell*, 10 Allen, 6, 7; *Jackson* v. *Phillips*, 14 Allen, 539, 550; *Kent* v. *Dunham*, 142 Mass. 216.

[17] *Dexter* v. *Gardner*, 7 Allen, 243, 246.

"The rule of public policy, which forbids estates to be indefinitely inalienable in the hands of individuals, does not apply to charities. These, being established for objects of public, general and lasting benefit, are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual." Gray, J., in *Odell* v. *Odell*, 10 Allen, 1, 6.

[18] *Odell* v. *Odell*, 10 Allen, 1, 7.

[19] In such a case the preceding estate becomes absolute unless subject to a condition that causes it to revert to the donor. *Brattle Square Church* v. *Grant*, 3 Gray, 142, 156; *Theological Education Society* v. *Attorney General*, 135 Mass. 285, 288; *First Society* v. *Boland*, 155 Mass. 171.

[20] Gray, Rule against Perpetuities, §§ 594-596; Bigelow,

§ 27. But a gift may be made in trust for a charity not existing at the date of the gift and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards, provided there is no gift of the property meanwhile to or for the benefit of any individual or private corporation.[21] The fact that a part of the income in the meantime is given to individuals does not affect the ultimate gift.[22]

§ 28. It has been held in England that, if a gift is made in trust for one charity in the first instance, and then over to another charity on the happening of a contingency which may not take place within the limit of the rule against perpetuities, the gift to the second charity is good, because no individual is concerned and no private use involved; the estate

J., in *Brattle Square Church* v. *Grant*, 3 Gray, 142, 154; citing *Commissioner of Charitable Donations* v. *Baroness deClifford*, 1 Dru. & War. 245, 253, 254.

[21] Gray, J., in *Odell* v. *Odell*, 10 Allen, 1, 6.

In *Codman* v. *Brigham*, 187 Mass. 309, the testator left a fund to his executors to be held for twenty-five years, during which a part of the income was to be paid to individuals and the balance accumulated. At the end of the twenty-five years the fund with its accumulations was to be used to found a public hospital. The will contained directions that this be accomplished by forming a corporation to which the fund was to be conveyed. It was held that the charitable trust came into existence with the probate of the will, the sick poor being the beneficiaries, and the establishment of the corporation merely a detail of administration; and that the case was therefore not within the rule against perpetuities.

Cf. Fellows v. *Miner*, 119 Mass. 541; *Gill* v. *Attorney General*, 197 Mass. 232.

[22] *Codman* v. *Brigham*, 187 Mass. 309.

is no more perpetual in two successive charities than in one charity; and so the law against perpetuities and remoteness has no application, and there is nothing to restrain the donor from affixing such limitations and contingencies in point of time to his charitable gift as he pleases.[23] But the propriety of this exception, at least in cases where the legal as well as the equitable interests change hands, has been questioned.[24]

(c) *Directions for Accumulation*

§ 29. Akin to the rule against perpetuities is the rule that property may not be held intact for an indefinite time for the purpose of accumulation. Directions to accumulate the income of a fund for a fixed period of more than twenty-one years or for a contingent period beyond the termination of a life or lives in being and twenty-one years, for the benefit of an individual or private object, are void. In England the Thellusson Act applied as well to charities as to private trusts. But in Massachusetts accumulations for charitable purposes may, if confined within reasonable limits, go on indefinitely. The trust fund under Dr. Franklin's will was not to be applied until it had accumulated for one hundred years.[25] In many cases provisions for accumulation to which no time limits have been set have been passed by the courts without question.[26]

[23] *Christ's Hospital* v. *Grainger*, 16 Sim. 83, 100. This case is cited with apparent approval by GRAY, J., in *Odell* v. *Odell*, 10 Allen, 1, 8-9.

[24] Gray, Rule against Perpetuities, §§ 598, 602.

[25] *City of Boston* v. *Doyle*, 184 Mass. 373-377.

[26] In *Northampton* v. *Smith*, 11 Met. 390, one fund, of $200,000, was to be accumulated until it amounted to

§ 30. The course adopted by the Massachusetts courts is "to hold that the limits of an accumulation for the benefit of a charity are subject to the order of a court of equity. By this method of solving the difficulty, on the one hand an unreasonable and unnecessary trust for accumulation can be restrained, and on the other hand a reasonable accumulation can be allowed to carry out the intention of the benefactor

$400,000. Another fund, of $30,000, was to be accumulated for sixty years.

See also *Nelson* v. *Cushing*, 2 Cush. 519; *First Society* v. *Fitch*, 8 Gray, 421; *Baker* v. *Clarke Institution*, 110 Mass. 88; *American Colonization Society* v. *Smith Charities*, 2 Allen, 302; *Codman* v. *Brigham*, 187 Mass. 309.

In *Hawes Place Society* v. *Hawes Fund*, 5 Cush. 454, the income from land devised was to be applied by the trustees to the support of schools and a church, with the provision that, when the income should have accumulated so as in the opinion of the trustees to answer the purposes described, the surplus should be used to establish a second church. The rent at the testator's death amounted to $650 a year. The court held that it lay with the trustees to say when the amount was sufficient; that the fund must necessarily be allowed to accumulate for a long time before the objects designated could be carried out.

In *Tainter* v. *Clark*, 5 Allen, 66, the testator directed that the trustee and his heirs should have a *reasonable time* in which to found a school with property left for that purpose. Eight years after the property came into their hands, it being in their judgment still insufficient, they were authorized by the court to continue to accumulate it.

In *American Academy* v. *Harvard College*, 12 Gray, 582, the income of a fund was to be paid every two years to the persons making the two most important discoveries in certain branches of science during the preceding two years; and the trustees were authorized, if in their opinion no discovery had been made in the two years of sufficient value to merit the prize, to add the income for that period to the principal.

and to secure the accomplishment of the trust in the best manner.''[27] If the donor attaches to the gift a direction for accumulation for an unreasonable time, the court, in the exercise of its power to carry out the trust *cy-pres,* will modify that direction, or throw it aside altogether and apply the gift immediately so as to carry out the donor's general intention. But to authorize such interference with the testator's directions the accumulation must be unreasonable, unnecessary, and to the public injury. It is not enough that the trustees do not wish to continue it, or that any one in behalf of the charity asks that it be not continued. The court must be satisfied that there is good reason why the testator's directions cannot be carried out.[28] On the other hand, the court will not instruct trustees to accumulate a fund at present too small to accomplish the testator's specific design, on the chance that it may at some future time become sufficient for that purpose.[29] In such a case, if there is a general charitable intent, the gift will be administered *cy-pres;* otherwise it will fail, and a trust result for the testator's heirs.[30]

[27] *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 204; *Dexter* v. *Harvard College*, 176 Mass. 192; *Codman* v. *Brigham*, 187 Mass. 309; *Ripley* v. *Brown*, 218 Mass. 33, 34. *Oldfield* v. *Attorney General*, 219 Mass. 378, 379; Gray, Rule against Perpetuities, §§ 678, 679.

[28] *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 204; Gray, Rule against Perpetuities, §§ 678-679.

[29] *Ely* v. *Attorney General*, 202 Mass. 545; *Grimke* v. *Attorney General*, 206 Mass. 49.

[30] See below, § 33.

(*d*) *Administration Cy-Pres*

§ 31. If the beneficiary of a private trust under a will dies, his interest ends, and the limitation over, if there is one, takes effect—otherwise there is an intestacy. But if a charitable institution named as a legatee or as the beneficiary or trustee of a charitable trust becomes extinct, the trust does not necessarily fail. If the gift was prompted by a general charitable intent, the court will direct that it be administered *cy-pres*—so as to give effect to the donor's general design in a way as like as possible to that prescribed by him. A general charitable intent means a purpose to further some general charitable object, such as relief of the poor, education, spreading Christianity, lessening the dangers of navigation, etc., and if such an intent can be discovered, the gift will not be allowed to fail merely because the method indicated for carrying it into effect is impossible.[31] Thus, where a testator gave money and land to establish and maintain a hospital and directed that the land be used as a site, and the land was unsuitable, the court found the general intent to found the hospital outweighed the wish that it be built in a specific place, and decreed that the gift be administered *cy-pres*.[32] Similarly, a gift to the inhabitants of a town for "educational purposes" or for the use of the school district will not fail because of a direction that a part of the fund be used in building a schoolhouse where none is needed, or in an unsuitable loca-

[31] *Theological Education Society* v. *Attorney General*, 135 Mass. 285, 289.

[32] *Weeks* v. *Hobson*, 150 Mass. 377.

tion.[33] The decision in every case depends on the circumstances peculiar to the case. Examples of cases where the *cy-pres* rule was applied are given in the notes.[34]

[33] *Sears* v. *Chapman*, 158 Mass. 400; *Attorney General* v. *Briggs*, 164 Mass. 561.

[34] In *American Academy* v. *Harvard College*, 12 Gray, 582. a fund was left by Count Rumford to the Academy in trust to pay the income every three years as a prize for the most important discovery in the subjects of light and heat during the two years preceding. The trustees, being of opinion that no discoveries meriting the gift had been made, petitioned the court for a modification of the trust. The case was sent to a master to devise a scheme by which the general intent to encourage discoveries and improvements in those branches of science might be carried out.

In *Jackson* v. *Phillips*, 14 Allen, 539, trust funds were to be devoted in various ways to creating a public sentiment that would put an end to negro slavery, and also for the benefit of fugitive slaves. The will was not probated until after the slaves had been emancipated and the war ended. But the testator, in a preamble to his will, had expressed his views on slavery with much vehemence; and the court, discovering a general charitable intent to benefit slaves, not as such, but as an unfortunate class of mankind, held that the trust could be administered *cy-pres*. A part of the fund was applied to the benefit of poor among the negroes in and about Boston, preference being given to escaped slaves, and part was given to an institution formed for the relief and education of freedmen.

In *Dickson* v. *United States*, 125 Mass. 311, the testator, expressing a wish to contribute his "mite towards suppressing the rebellion and restoring the Union," gave his estate to the United States Government. This will did not go into effect until 1876. The court, however, construed the introductory clause as merely expressing the testator's motive, and not as defining or limiting the purposes to which the property might be applied, and held the trust valid as a trust for governmental purposes.

In *Minot* v. *Baker*, 147 Mass. 348, the executor was instructed to dispose of the estate for such charitable pur-

§ 32. Where the gift is expressed to be *in trust for* a charitable purpose, the trust will never be al-

poses as he might think proper. He died after disposing of but a small part of the estate. Appointment by the executor named was held not to be a condition of the gift, the application of the fund to charity being the "dominant object" and the selection by the executor "subordinate" or "means to an end."

In *Sherman* v. *Congregational Missionary Society*, 176 Mass. 349, where a woman left her house and land as a home for old women and working girls, "the plan to be hereafter devised or left in care of said executor," the court held that even if this clause be construed as meaning that the testatrix was to leave a plan, her failure to do so would not defeat the general charitable intent which led her to make the devise.

In *Amory* v. *Attorney General*, 179 Mass. 89, the testatrix left her house to trustees to be used as a rest home for poor women and children, to be managed by the Sisters of St. Margaret; and, if they should cease to manage it, directed the trustees to convey the property to the Massachusetts General Hospital to be held for the same or similar charitable purposes. Both the Sisters and the hospital declined the trust. On a petition for instructions the court held the trust should be administered *cy-pres;* the direction to transfer the property to the hospital showing a general charitable intent underlying the scheme of administration.

In *Osgood* v. *Rogers*, 186 Mass. 238, where a fund was given to two churches as tenants in common to be used to "support the said churches in their religious worship," and one of them ceased to exist, there was found sufficient evidence of a general charitable intent to warrant administration *cy-pres*.

In *Codman* v. *Brigham*, 187 Mass. 309, the testator left a fund to found a public hospital for sick persons in indigent circumstances, and directed that a corporation be formed to conduct the hospital. Though the language of this direction was mandatory, the court held that the substance of the charity was the care of sick and indigent persons in a hospital, administration by a corporation rather than by personal trustees not being of its essence;

lowed to fail for want of a trustee—at least where the discretion of the trustee named was not of the essence of the gift; and if the trustee dies or declines to act, or, in the case of a corporation, ceases to exist, the court will appoint a new trustee to fill the vacancy. [35] If a foreign trustee named in a Massachusetts will to

and that impossibility of administering it in the mode prescribed would not defeat the gift.

In *Richardson* v. *Mullery*, 200 Mass. 247, a resident of Salem left her estate "to the life saving station to be built and established in Marblehead or Nahant." When the will was made there had been talk of placing a life-saving station in one of those places. The plan was abandoned, the treasury department disclaimed interest in the gift, and the trust became impossible of execution. But the court held that the trust intended was not limited to the "direct maintenance and support of this station by the expenditure of money in aid of the government for that purpose," but was meant to "include the promotion of the general interests which the station was designed to serve, and kindred interests in furtherance of a purpose to be helpful in this general field," viz., the general saving of life and relief of suffering in cases of shipwreck in the vicinity of Marblehead and Nahant.

In *Ely* v. *Attorney General*, 202 Mass. 545, a woman left the residue of her property to found a kindergarten home for deaf children, to be located on the estate where she had lived. The buildings burned down and the funds were insufficient to restore and maintain them. The trust was administered *cy-pres* by turning over the fund to a similar home, which the testatrix had taken as a model for the home she wished to endow.

In *Norris* v. *Loomis*, 215 Mass. 344, the testatrix gave her house for an "Old Folks Home," which was to bear her name, and gave her bank deposits for its maintenance. The house was too small and the funds insufficient, but the court discovered a primary aim to establish an old people's home to which the appropriation of the house was merely an incident, and directed that the design be carried out *cy-pres*.

[35] *Richards* v. *Church Home*, 213 Mass. 502.

administer a charity in another state is not permitted by the laws of his state to act as such trustee, the Massachusetts court will appoint a new trustee in his place.[36] Where a gift is made outright to a charitable institution which ceases to exist before the time comes for the gift to take effect, the courts have been very ready to infer a general intent to benefit the objects for which the institution existed. It has been said that an implication to create a public charity sometimes arises or may arise "from the character of the body to which the gift is made, or from the publicly avowed purposes of its organization and action."[37] Though no trust be declared in the gift, the institution nevertheless takes in trust for its charitable purposes, and the case is treated as one of failure of a trustee rather than failure of the object.[38] This application of the *cy-pres* doctrine has

[36] *Fellows* v. *Miner*, 119 Mass. 541.

[37] WELLS, J., in *Old South Society* v. *Crocker*, 119 Mass. 1, 24; KNOWLTON, C.J., in *Hubbard* v. *Worcester Art Museum*, 194 Mass. 290; *Eccles* v. *Rhode Island Hospital Trust Co.*, 90 Conn. 592; *American Bible Society* v. *American Tract Society*, 62 N.J. Eq. 219, 221.

[38] See below, § 37.

Read v. *Willard Hospital*, 215 Mass. 132; *Bliss* v. *American Bible Society*, 2 Allen, 334, 336.

Where the identity of the intended beneficiary is left in doubt by the instrument, evidence from outside sources will be admitted in aid of construction. *Minot* v. *Boston Asylum*, 7 Met. 416; *Washburn* v. *Sewall*, 9 Met. 280; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Faulkner* v. *Sailors' Home*, 155 Mass. 458; *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Richards* v. *Church Home*, 213 Mass. 502.

In *Darcy* v. *Kelley*, 153 Mass. 433, property was left to the "Sisters of Charity" to form a relief fund for the poor. There was no such organization as the Sisters of Charity;

not, however, escaped criticism. The courts have gone very far "in straining the meaning of wills, in order to uphold the supposed general intent." [39]

§ 33. On the other hand, if no general charitable design can be discovered, the *cy-pres* doctrine cannot be invoked, and if the trust cannot be carried out as directed, it will not be carried out at all. The accomplishment of the specific object indicated may have furnished the only inducement to give to charity, and if that object is impossible of attainment, the fund will not be diverted to other charitable uses. Thus, where land was given to a town with the express condition that a schoolhouse be built on it, with limitation over upon failure of the condition, it was held that, upon the town's neglecting to build the schoolhouse, the gift over took effect. [40] Similarly, where a fund was left to a town for the support of a clergyman of a certain denomination, the support of the clergyman not being within the power of the town, the trust failed, and the gift over took effect. The court held that what the testator required from the town went to the root of the gift. [41] Again, where a fund was left in trust to build and maintain a chapel in a remote part of Ireland, where the people were too few and poor to support a chapel, the scheme being impracticable, and there being no evidence of a general intent to spread Christianity, the trust

but, a general intent being indicated to relieve the poor, the gift was administered *cy-pres.*

[39] HOLMES, J., in *Stratton* v. *Physio-Medical College*, 149 Mass. 505, 508-509.

[40] *Hayden* v. *Stoughton*, 5 Pick. 528.

[41] *Bullard* v. *Shirley*, 153 Mass. 559.

failed.[42] So, too, if the designated charitable object ceases to exist, the trust comes to an end, and a resulting trust arises for the donor or his heirs, as, for example, where property was given to support the pastor of a certain church, and the church dissolved.[43] It makes no difference in such cases whether the gift to charity is expressly stated to be conditional, or whether there is or is not a gift over upon its failure.[44]

§ 34. The policy of favoring charity trusts ought

[42] *Teele* v. *Bishop of Derry*, 168 Mass. 341.

In *Bowden* v. *Brown*, 200 Mass. 269, a gift to a town to be applied toward the building of a home for the sick poor failed, the town having declined the gift and given up the plan of erecting the building. There being nothing to indicate an intention to aid the sick and poor in any other way than that specified, the charity failed altogether, and the estate went to the next of kin.

In *Stratton* v. *Physio-Medical College*, 149 Mass. 505, a gift to an educational institution which had ceased to exist was held to have failed, there being no indication that enjoyment of the gift by the institution named was subordinate to a general purpose to promote education.

In *Olliffe* v. *Wells*, 130 Mass. 221, an executor was directed to distribute a fund in such manner as to carry out wishes which the testatrix had expressed or might express to him, but she had left no written instructions, merely expressing the wish orally, at the time she executed the will, that the property should be used for certain charitable purposes. It was held that the trust was too indefinite to be carried out. The oral instructions could not be incorporated into the will, and the fact that the trust was for a charity could not cure the defect. See, to the same effect, *Wilcox* v. *Attorney General*, 207 Mass. 198; *Thayer* v. *Wellington*, 9 Allen, 283.

[43] *Easterbrooks* v. *Tillinghast*, 5 Gray, 17.

[44] *Easterbrooks* v. *Tillinghast*, 5 Gray, 17.

If there is no gift over, the heirs or next of kin for whom the resulting trust arises are determined as of the date of

not to be carried so far that the testator's particular intentions are to be sacrificed merely because the gift he intended was a charity. It is necessary to go farther and prove affirmatively the existence of an underlying general charitable motive that furnished the inducement to the particular gift. Whether that motive exists is often a close question. Each case turns on its own facts—primarily on the language of the instrument; and if that is not conclusive, the facts and circumstances tending to explain the language may be shown in evidence in aid of construc-

the testator's death, and not as of the date when the trust is proved impossible to perform. *Gill* v. *Attorney General*, 197 Mass. 232.

In *Harvard College* v. *Society for Promoting Theological Education*, 3 Gray, 280, 293, the President and Fellows of Harvard College, as trustees of funds held for the benefit of the Divinity School, brought a bill in equity asking leave to transfer the funds to new trustees. It appeared that the College and the Theological School could not be conveniently managed by the same corporation; that the exercise of the trusts for the Divinity School was inconsistent with and injurious to the execution of prior trusts vested in them as trustees of the College; that the united management of the two institutions was injurious to the Divinity School; and that the trusts could be better administered by other trustees or by a separate institution disconnected from the College. These circumstances were held insufficient to justify interference with the terms of the trust.

In *Winthrop* v. *Attorney General*, 128 Mass. 258, testator left funds in trust to found and maintain a museum of archæology connected with Harvard College. Minute instructions were given the trustees as to their records, reports, and details of their management, full discretion being reposed in them. It was held that the inconvenience and extra expense of this method of management would not justify entrusting the funds for management to the President and Fellows.

tion.[45] The attitude of the courts toward charitable gifts is favorable.[46] If the specific gift fails, the motives of the donor are analyzed, and slight evidence of a general intent is sufficient to turn the scale.[47] If the court decides that the case is one for application of the *cy-pres* rule, the case is generally referred to a master to report a scheme of administration; but the master's recommendations are, of course, subject to review by the court.[48] The question, which has given rise to many petitions for instructions, can be avoided by a simple statement in the will as to what shall be done if the specific gift fails.[49]

§ 35. To justify the application of the *cy-pres* rule it is not enough that the mode of administration directed by the testator will cause inconvenience to the trustee, or that an easier and better scheme might be evolved for performing the trust. The court will

In *Cary Library* v. *Bliss*, 151 Mass. 364, 374, money had been given to a town to be used for purchasing books for a public library, the fund being placed in the management of trustees, consisting of the selectmen, school committee, and clergymen in the town, who were given discretion as to the books to be purchased and general supervision of the library. The legislature by special act created a corporation to take over and manage the fund. The act was held unconstitutional and the corporation incapable of taking the fund.

[45] *Stratton* v. *Physio-Medical College*, 149 Mass. 505; *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, 205.

[46] See above, § 1, note.

[47] See, for example, *Richardson* v. *Mullery*, 200 Mass. 247; *Norris* v. *Loomis*, 215 Mass. 344.

[48] *Amory* v. *Attorney General*, 179 Mass. 89, 105; *Jackson* v. *Phillips*, 14 Allen, 539.

[49] See, for example, *Bartlett, Petitioner*, 163 Mass. 509, 518.

respect the donor's wishes in all details, and it will not alter the precise method of administration selected by him unless it is impracticable to perform the trust according to that method. *Cy-pres* is a doctrine of necessity, not of convenience.[50] A trustee should never undertake to administer a charitable trust *cy-pres,* without leave of court.[51]

[50] *Baker* v. *Smith,* 13 Met. 34, 41; *Fellows* v. *Miner,* 119 Mass. 541, 546; *Winthrop* v. *Attorney General,* 128 Mass. 258; *Crawford* v. *Nies,* 224 Mass. 474.

[51] *Lakatong Lodge* v. *Board of Education,* 84 N.J. Eq. 112.

CHAPTER III

MANAGEMENT AND PROCEDURE

Synopsis

§§ 36-39. Trustees—Appointment, qualification, etc.
40-42. Power of courts to remove—Filling of vacancies.
43-45. Powers and duties of trustees—Unanimous or majority action—When controlled by courts—Power of legislature to change mode of administration.
46. Sale of trust real estate.
47-48. Petitions to the court for instructions.
49. Attorney general—Powers and duties in respect to charity trusts.
50-51. Contractual liability of trustees, and right of indemnity—Limited remedies against governmental agencies.
52. Personal liability of trustees, and statute of limitations.
53. Liability of subscribers to charitable projects.

§ 36. Charity trusts may be administered either publicly, through the agency of public charitable institutions [1] or boards of public officers, [2] or privately, by individual trustees. [3] The fact that the trust is to be administered privately does not affect its validity, so long as its objects are of public benefit. [4] Parishes and towns frequently serve as trustees of

[1] *Minns* v. *Billings*, 183 Mass. 126.

[2] See, for example, *Boston* v. *Doyle*, 184 Mass. 373.

[3] *Minns* v. *Billings*, 183 Mass. 126.

[4] *Bullard* v. *Chandler*, 149 Mass. 532-541.

"It is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of a charity. It makes little difference to the contributors, the poor, or the public, and none in the nature of the charity, what is the mode of distributing relief." Gray, J., in *Saltonstall* v. *Sanders*, 11 Allen, 446, 455-456.

charitable trusts.[5] A state may be made trustee.[6] The United States may act as trustee in administering gifts for the benefit of the government.[7] Gifts for the benefit of churches, or to churches upon charitable uses, may be managed by deacons, wardens, or similar officers as trustees, or by trustees appointed by them.[8] The legal title to the fund need not be vested in the persons entrusted with its management. The power to manage, both in respect to investment and to application of the fund, may be given to the holders of the legal title, or to a manager or board of managers distinct from the holder of the legal title.[9]

§ 37. If a corporation, either municipal or private, named as trustee, is without power under its charter to accept the gift, it may, none the less, serve as trustee if the disability can be removed by act of legislature or amendment of its charter within a reasonable time.[10] Where the testator directs that a

[5] *First Parish* v. *Cole*, 3 Pick. 232, 238; *Hayden* v. *Stoughton*, 5 Pick. 528; *Drury* v. *Natick*, 10 Allen. 169, 182; *Second Society* v. *Harriman*, 125 Mass. 321; *Burbank* v. *Burbank*, 152 Mass. 254; *Quincy* v. *Attorney General*, 160 Mass. 431; *Weston* v. *Amesbury*, 173 Mass. 81.

[6] *Bell* v. *Nesmith*, 217 Mass. 254.

[7] *Dickson* v. *United States*, 125 Mass. 311, 313-315; *Richardson* v. *Mullery*, 200 Mass. 247; *Fay* v. *Locke*, 201 Mass. 387.

[8] Revised Laws, c. 37.

[9] See, for example, *Webb* v. *Neal*, 5 Allen, 575; *Drury* v. *Natick*, 10 Allen, 169; *Marsh* v. *Renton*, 99 Mass. 132; *Higginson* v. *Turner*, 171 Mass. 586; *Boston* v. *Doyle*, 184 Mass. 373; *City Missionary Society* v. *Memorial Church*, 186 Mass. 531.

[10] *Baker* v. *Clarke Institution*, 110 Mass. 88, 91; *Fellows* v. *Miner*, 119 Mass. 541; *Sohier* v. *Burr*, 127 Mass. 221; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280.

corporation may be formed to act as trustee, his wishes will be carried out, and the corporation, when organized, allowed to act. As noted above, a reasonable though indefinite postponement of the application of the gift does not defeat it where it is not in substitution of a preceding gift. [11] The objection that acceptance of a gift is *ultra vires* of the trustee named is open to the state alone, and cannot be availed of by the testator's heirs. [12]

§ 38. If a gift to a charitable institution is made on a valid condition, performance of which is within the powers of the donee, and the donee violates the condition, it forfeits its right to the gift; [13] and if the money has been paid over to the donee, it can be recovered. [14] But if compliance with the condition is illegal or beyond the powers of the donee, the condition is repugnant to the gift and void, and the gift takes effect in spite of it. [15] Where a gift of land is

[11] See above, § 30.

Odell v. *Odell*, 10 Allen, 1, 5, 8; *Codman* v. *Brigham*, 187 Mass. 309, 313.

[12] *Brown* v. *Kelsey*, 2 Cush. 243, 250; *Codman* v. *Brigham*, 187 Mass. 309; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280; *Chase* v. *Dickey*, 212 Mass. 555.

[13] *Austin* v. *Cambridgeport Parish*, 21 Pick. 215, 222; *Princeton* v. *Adams*, 10 Cush. 129; *American Colonization Society* v. *Smith Charities*, 2 Allen, 302; *First Society in North Adams* v. *Boland*, 155 Mass. 171; *Fay* v. *Locke*, 201 Mass. 387.

For a case involving any inexcusable delay in performing a condition see *Capen* v. *Skinner*, 177 Mass. 84.

Cf. *Bell* v. *Nesmith*, 217 Mass. 254.

[14] *Morville* v. *American Tract Society*, 123 Mass. 129.

[15] *Drury* v. *Natick*, 10 Allen, 169, 183; *Giles* v. *Boston Fatherless & Widows' Society*, 10 Allen, 355.

made to a city, subject to the condition that it always be put to a certain public use, cessation of that use forfeits the city's right to the land.[16]

§ 39. Individual trustees appointed to distribute funds left by will for charitable objects are subject to the same statutory requirements as trustees for individuals in respect to giving bonds for the faithful performance of their duties. They must furnish sureties unless expressly exempt by the terms of the will or excused by the judge of probate.[17] But if the trust is to establish a public or permanent institution by incorporation or by perpetual succession of trustees, with directions for the rendering and auditing of their accounts and for general supervision by a permanent board of visitors, no bonds are required. The machinery of the probate law does not apply to permanent trusts for charitable purposes where the donor has established a complete plan of administration.[18] Charitable societies and institutions that receive state aid are required to file annual reports of

[16] *Howe* v. *Lowell*, 171 Mass. 575.

The statutory provision limiting to thirty years the duration of conditions and restrictions as to the use of real estate does not apply to gifts for public, charitable, or religious purposes. Revised Laws, c. 134, § 20.

[17] *White* v. *Ditson*, 140 Mass. 351, 356; *Drury* v. *Natick*, 10 Allen, 169, 176.

By chapter 295 of the Acts of 1908 the provisions of Revised Laws, c. 149, requiring trustees to give bonds, are made applicable to trustees for charitable purposes; but discretionary power is given to the Probate Court to exempt such trustees from giving sureties.

[18] *Lowell, Appellant*, 22 Pick. 215; *White* v. *Ditson*, 140 Mass. 356; *Drury* v. *Natick*, 10 Allen, 169; *Boston* v. *Doyle*, 184 Mass. 373, 387.

their income, expenditures, number of beneficiaries, etc., with the state board of charity.[19]

§ 40. If an individual named as trustee refuses to accept the trust, a court of equity jurisdiction or probate court having jurisdiction of the trust will appoint another trustee in his place.[20] If he neglects his duty, the court will compel him to perform, or replace him, as in the case of a trust for individuals. This power is inherent in a court of equity, and may be invoked by the attorney general, or, where there is more than one trustee, by one trustee against another. The power to remove is also given to the Supreme, Superior, or Probate Court by statute,[21] if such removal is for the interests of the beneficiaries, or if the trustee is insane, incapable of performing his trust, or unsuitable. It would seem that, in proceedings for removal of a trustee under the statute, the petition should be brought by the attorney general as the representative of those beneficially interested. If a trustee dies before completing his trust, a new trustee may be appointed in his place, unless the discretion reposed in him was an essential feature of the trust.[22]

§ 41. If the testator fails to name any trustee,

[19] For the functions of the state board of charity see Revised Laws, c. 84; Acts of 1903, c. 402; Acts of 1915, c. 14.

[20] Revised Laws, c. 147, § 5; *First Society* v. *Fitch*, 8 Gray. 421; *Webb* v. *Neal*, 5 Allen, 575.

[21] Revised Laws, c. 147, § 11.

See Fuller, Massachusetts Probate Laws (2d ed.), p. 263.

[22] Revised Laws, c. 147, § 5; *Schouler, Petitioner*, 134 Mass. 426.

The statutory jurisdiction to appoint trustees to fill vacancies does not include power to appoint visitors or managers without legal title. *Higginson* v. *Turner*, 171 Mass. 586, 594.

legal title will descend to his heirs or next of kin, but it descends charged with the trust. They will be compelled to carry out the trust in the manner designated, or, as more frequently happens, the court will appoint some other person or institution to act as trustee.[23] Once the property is charged with a charitable trust, all beneficial interest is beyond the reach of the heirs at law or next of kin. But if administration of the trust by the person named as trustee is the paramount feature of the gift, or if it is apparent that the discretion given the trustee was meant to be exercised by him alone, and no other, his death or declination will defeat the trust. In such a case, as already noted, the *cy-pres* doctrine cannot be invoked.[24] If, however, a charitable institution named as donee refuses to accept the gift or ceases to exist, the court will not, as a general rule, permit the gift to fail. Though no trust is declared in the gift, the institution is, after all, only a trustee for the purposes of its organization. The courts do not hesitate to imply a general charitable intent to further those objects from the fact of the gift to the institution;[25] and if the institution named in the gift cannot administer it, the court will direct the executor to turn

[23] *Sanderson* v. *White*, 18 Pick. 328-334; *Bartlett* v. *Nye*, 4 Met. 378; *Missionary Society* v. *Chapman*, 128 Mass. 265; *Darcy* v. *Kelley*, 153 Mass. 433.

[24] See above, § 32.

A fortiori where administration by a person designated is made a condition of the gift. *Pope* v. *Hinckley*, 209 Mass. 323, 328.

[25] *Old South Society* v. *Crocker*, 119 Mass. 1, 24; *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 290.

See above, § 32.

it over to some similar institution to be used for the same purposes.[26] If the instrument directs that vacancies be filled by the surviving trustees, this direction will be enforced, the selection being, however, subject, in the case of testamentary trusts, to the approval of the Probate Court. If a public board named as managers becomes extinct, as, for example, through change in municipal organization, and there is no provision in the instrument for filling the vacancy, a court of equity will appoint a new board of managers.[27]

§ 42. The court will not permit a change of trustees, nor alter the details of administration, except in cases of necessity.[28] The donor's wishes will be respected. No modification of the terms of his gift will be sanctioned unless strict compliance is impossible.[29] A town or corporation which has accepted a gift for public purposes will not be permitted later to renounce the gift.[30] The rule that a trust must be administered strictly in accordance with its terms is not limited to matters relating to the care and custody of invested funds. It governs the administration of the trust in all aspects. The responsibilities imposed and powers given the trustees cannot be delegated.

[26] *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 290, and cases cited; *Read* v. *Willard Hospital*, 215 Mass. 132.

[27] *Boston* v. *Doyle*, 184 Mass. 373.

[28] *Baker* v. *Smith*, 13 Met. 34, 41-42; *Harvard College* v. *Theological Education Society*, 3 Gray, 280; *Winthrop* v. *Attorney General*, 128 Mass. 258-261; *Cary Library* v. *Bliss*, 151 Mass. 364, 374.

[29] *City Missionary Society* v. *Memorial Church*, 186 Mass. 531, 539.

[30] *Drury* v. *Natick*, 10 Allen, 169; *American Academy* v. *Harvard College*, 12 Gray, 582, 595.

Thus, in the recent case of *President and Fellows of Harvard College* v. *Attorney General,*[31] an arrangement for the administration of the McKay Endowment for a scientific school by Harvard College and the Massachusetts Institute of Technology jointly was held to be repugnant to the terms of the gift. The language of the trust instrument and the circumstances attending the making of it disclosed an intention on the part of the giver that the education to be provided should be under the control and direction of the University. This essential feature of the trust could not be varied by the trustee, even though the proposed change might enable the work to be done to greater public advantage.

§ 43. Individual trustees must act unanimously in administering their trust. If, however, administration is entrusted to a public board, the decision of the majority governs, unless the instrument of gift directs otherwise.[32] Where a trust is administered by individuals, if a majority assume to act against the judgment of the minority, the latter may have their action reviewed by the court on a bill in equity, and enjoined or annulled if it violates the trust. Thus, where two of three trustees charged with the administration of a charitable trust exchanged the trust real estate for other real estate and conveyed the latter to a corporation on condition that it carry out the trust, on a bill in equity by the minority trustee the Supreme Court set aside the conveyances.[33] But the

[31] 228 Mass. 396.

[32] *Boston* v. *Doyle*, 184 Mass. 373, 385.

[33] *Morville* v. *Fowle*, 144 Mass. 109; *Eastman* v. *Allard*, 149 Mass. 154.

court will not interfere to regulate the action of trustees in matters involving only the exercise of discretion delegated to them by the creator of the trust unless they abuse their discretion or act in violation of law.[34] It will not substitute its discretion for theirs. Where the donor has stipulated for a fixed number of trustees, and a vacancy occurs, the survivors cannot make further application of the fund until the vacancy is filled.[35]

§ 44. Where the duties of management are divided between trustees and a board of visitors, the two together constitute the government of the charitable organization, and any attempt to invoke the power of the courts to control the action of the trustees before the visitors have acted is premature.[36] If the visitors refuse to act at all, mandamus will lie against them. If they act in violation of their duties, they can be reached under the general equity power of the court in proceedings by the attorney general. But the heirs of the founder of a public charity have no standing to compel trustees or visitors to perform their duties.[37] Trustees of funds given to cities or towns for charitable, religious, or educational purposes are required by statute to make annual reports to the aldermen or selectmen, and, for neglect to do

[34] *Murdock, Appellant*, 7 Pick. 303, 322; *Sanderson* v. *White*, 18 Pick. 328, 337-339; *Attorney General* v. *Parker*, 126 Mass. 216, 220; *Richardson* v. *Mass. Charitable Mechanic Assn.*, 131 Mass. 174.

[35] *Marsh* v. *Renton*, 99 Mass. 132.

[36] *Nelson* v. *Cushing*, 2 Cush. 519, 530-532.

[37] *Sanderson* v. *White*, 18 Pick. 328, 339.

so or incapability of discharging the trust, may be removed by the Probate Court of the county.[38]

§ 45. Where property is left to a town or corporation for charitable purposes, and the particular mode of administration is prescribed by the donor, the donee by accepting the gift binds itself to administer the trust in the manner prescribed. Nor can the legislature interfere to control or change the method. Thus, where a testator left money to a town for a library to be managed under the supervision of the town in a specified manner, the legislature was held powerless to form a corporation to manage it, as this would impair the obligation assumed by the town in accepting the gift.[39] The legislature cannot, however, enact that title to property held by a city or town on a charitable trust shall be transferred, against the consent of the town, to a corporation to administer the trust.[40] If the donor stipulates that the trust shall last forever, it is doubtful if the legislature has power to terminate it.[41] If, however, the donor does not prescribe a precise method of administration, the donee is free to adopt whatever method seems best, subject only to the limitation that the action be taken in good faith. Thus a municipality named as donee may appoint trustees to manage the trust, or a corporation may be organized, either under general law or by special act of legislature, to act as agent of or as trustee for

[38] Revised Laws, c. 37, §§ 13-14.

[39] *Cary Library* v. *Bliss*, 151 Mass. 364, 375.

[40] *Proprietors of Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509.

[41] *Crawford* v. *Nies*, 224 Mass. 474, 488.

the municipality in administering the trust.[42] The power of the legislature over the agencies of government does not include the power to take, without compensation, property held by municipalities for other than strictly governmental purposes. The line that separates those uses with which the legislature may, and those with which it may not, so interfere has not been precisely defined. The power has been held not to extend to burial grounds, and the court has suggested *obiter* that it does not include waterworks, parks, public markets, hospitals, and libraries.[43] The question whether real estate given for one public purpose can be taken for a different public purpose by right of eminent domain has not been presented in this state. There may be such an acceptance of the gift by the legislature or other public authorities as to deprive them of the right to divert the property from the use for which it was given.[44]

§ 46. Trustees of charitable trusts may sell real or personal estate belonging to the trust, without leave of court, if authorized to sell by the instrument creating the trust.[45] If the trustee or purchaser desires further assurance as to the validity of such power, this may be had by petition to the Land Court, if desired by the trustee or purchaser.[46] Where power

[42] *Ware* v. *Fitchburg*, 200 Mass. 61.

[43] *Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509.

The courts of other states are not in harmony on the point. The test differs from that applied in cases of liens for work on public buildings devoted to charitable uses. See § 51, below.

[44] *Codman* v. *Crocker*, 203 Mass. 146, 151.

[45] *Amory* v. *Attorney General*, 179 Mass. 89. 105.

[46] Acts of 1906, c. 344. See also *Rowley, Petitioner*, Davis, Land Court Decisions, 266.

to sell is not expressly given by the trust instrument, a sale may be authorized under Revised Laws [47] or by act of legislature. [48] A court of equity may authorize a sale under the *cy-pres* rule if the primary objects of the trust cannot otherwise be accomplished. [49]

§ 47. If an executor or trustee is uncertain as to his duties, he may in certain cases petition the court for instructions. [50] Instructions may be had as to the validity of a gift made by deed or will, the identity of the persons entitled to it, [51] the disposition of the fund where prescribed details of administration cannot be carried out, the legality of provisions for accumulation, etc. [52] The proceeding may be either

[47] Revised Laws, c. 147, § 15; *Callahan, Petitioner*, Davis, Land Court Decisions, 258.

[48] *Old South Society* v. *Crocker*, 119 Mass. 1, 26; *Crawford* v. *Nies*, 220 Mass. 61, 65.

[49] *Weeks* v. *Hobson*, 150 Mass. 377, 379, 380; Gray, Rule against Perpetuities, § 590, note 3.

See above, §§ 31, 32.

[50] This procedure is not limited to the holder of the legal title. A board of managers without legal title, but charged with the duty of management, has an interest which entitles them to the court's instructions. *Drury* v. *Natick*, 10 Allen, 169, 175.

See also *Crawford* v. *Nies*, 224 Mass. 474, 490.

[51] *Bartlett, Petitioner*, 163 Mass. 509; *Codman* v. *Brigham*, 187 Mass. 309; *City Missionary Society* v. *Memorial Church*, 186 Mass. 531; *Boston* v. *Doyle*, 184 Mass. 373; *Richardson* v. *Essex Institute*, 208 Mass. 311; *Wilcox* v. *Attorney General*, 207 Mass. 198; *Richards* v. *Church Home*, 213 Mass. 502.

[52] *Amory* v. *Attorney General*, 179 Mass. 89; *Richardson* v. *Mullery*, 200 Mass. 247; *Bowden* v. *Brown*, 200 Mass. 269.

In *Nelson* v. *Georgetown*, 190 Mass. 225, trustees were instructed as to the extent of the power contained in a deed of gift to a town for a public library and delegated to them

in the Supreme, Superior, or Probate Court. Where there are rival claimants to the fund, the proceeding may be in the nature of a suit of interpleader.[53] In all such cases it is customary to allow costs as between solicitor and client to be paid out of the general assets of the estate.[54] Where executors or trustees are directed to select the objects under a general gift for charitable purposes, they may be instructed as to whether the objects they select are, in point of law, charities.[55] They must make their selection first and supply all necessary facts for the information of the court, and they cannot throw upon the court the burden of making the selection for them.[56] If they are in doubt as to their liability for succession taxes, they may petition the Probate Court for instructions.[57] A petition of trustees will lie for instruc-

by vote of the town to contract for the building of the library, and as to their liability to the contractor.

[53] *Ware* v. *Fitchburg*, 200 Mass. 61.

If it is impossible to determine from the language of the will and the attending circumstances serving to explain the language, which of two or more charitable institutions is entitled as the legatee, extrinsic evidence of the testator's actual intention is admissible. See SHAW, C.J., in *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, 202-209; *Bodman* v. *American Tract Society*, 9 Allen, 447. But, if one charitable institution is correctly named as legatee, extrinsic evidence that the testator intended a different institution will not be admitted to contradict the will.

[54] *Deane* v. *Home for Aged Colored Women*, 111 Mass. 132.

[55] *Minns* v. *Billings*, 183 Mass. 126.

[56] *Minns* v. *Billings*, 183 Mass. 126. See also *Godfrey* v. *Hutchins*, 28 R.I. 517, 522.

[57] Acts of 1909, c. 490, part IV, § 21.

Executors appointed in Massachusetts under foreign wills may petition under this section. *Callahan* v. *Woodbridge*, 171 Mass. 595.

tions as to whether a proposed plan for the administration of the trust conforms to the requirements of the trust instrument. [58]

§ 48. Courts will not give instructions as to questions concerning simple ministerial duties of a trustee that do not concern the validity of the trust or the interpretation of the instrument, or opposing claims upon the trust fund. [59] If the conduct of the trust and the application of the fund are left to the discretion of the trustees, the court will refuse instructions as to the exercise of that discretion. [60] Moreover, the question confronting the trustees must be immediate. Until the funds are actually in their hands and the time to dispose of them has arrived, a bill for instructions is premature. [61] A petition for instructions will not lie unless the trustee has "real and serious doubts as to his duties" and needs the advice of the court to enable him properly to discharge his trust. [62] He cannot have instructions on a point relating to past administration, [63] but only touching matters requiring his future action. Neither the consent of all parties in interest nor the value to them or to the public generally of the instructions sought makes any difference; the rule will be strictly

[58] *Harvard College* v. *Attorney General*, 228 Mass. 396.

[59] *Dodge* v. *Morse*, 129 Mass. 423, 425.

[60] *Amory* v. *Green*, 13 Allen, 413; *Proctor* v. *Heyer*, 122 Mass. 525.

[61] *Bullard* v. *Attorney General*, 153 Mass. 249-250; *Oldfield* v. *Attorney General*, 219 Mass. 378.

"This court does not sit for the discussion of moot questions." Loring, J., in *Hall* v. *Cogswell*, 183 Mass. 521-523.

[62] *Hill* v. *Moors*, 224 Mass. 163.

[63] *Sohier* v. *Burr*, 127 Mass. 221.

adhered to, and, unless the instructions sought are essential to the proper performance of the trust, the court will dismiss the petition of its own motion.[64] The trustee of a charity trust is a "person aggrieved" by an adverse decision of the Probate Court, and therefore has the right of appeal; but he is not obliged to appeal unless he sees fit, being protected by the probate decree.[65]

§ 49. In all proceedings where the beneficial interests in a charity trust ought to be before the court, the attorney general appears as their representative. It is his duty, both by virtue of his office and by statute, to enforce the proper administration of the funds given to public charities.[66] He may institute

[64] Funds subscribed for relief after the Salem fire in 1914 were administered by a committee, appointed by the governor. One branch of the relief work consisted in providing for the building of houses for those who had been burned out, $100,000 being appropriated by the general committee for this purpose. The "Rebuilding Committee" (a subcommittee in charge of this work), acting under authority of the general committee, formed a real-estate trust and dispensed money in loans to owners to enable them to rebuild, and in the purchase of land and construction of houses which were rented or sold at cost, etc. The trustees filed a petition for instructions whether their trust had been properly carried out, and alleged that the instructions sought were necessary in order to establish the validity of title to real estate that had been bought and conveyed by the trust. All parties, including the attorney general, joined in the trustees' request. The Court held that no proper case for instructions was stated, and dismissed the petition. *Hill* v. *Moors*, 224 Mass. 163.

[65] *Ripley* v. *Brown*, 218 Mass. 33, 34.

[66] *Parker* v. *May*, 5 Cush. 336; *Sanderson* v. *White*, 18 Pick. 328, 333, 339; *Attorney General* v. *Bedard*, 218 Mass. 378; *Crawford* v. *Nies*, 224 Mass. 475, 490.

any proceedings appropriate to the case.[67] If individuals interfere with the enjoyment by the public of lands dedicated to public use, he should take action to enjoin the interference.[68] Where the proceeding is by information, relators are named who may be held answerable for costs if the proceedings are without merit.[69] Where the information is successful, costs and counsel fees incurred in support of it may, in the discretion of the court, be paid from the fund.[70] Where the meaning or validity of a charitable gift is brought in question by a petition for instructions, the attorney general must be joined as a defendant.[71] If the donor's heirs or next of kin

[67] *Attorney General* v. *Parker*, 126 Mass. 216, 222.

[68] *Attorney General* v. *Onset Bay Grove Association*, 221 Mass. 342.

[69] *Attorney General* v. *Butler*, 123 Mass. 304.

[70] *Attorney General* v. *Old South Society*, 13 Allen, 474, 497.

[71] *Harvard College* v. *Society for Promoting Theological Education*, 3 Gray, 280; *Jackson* v. *Phillips*, 14 Allen, 539; *Chamberlain* v. *Stearns*, 111 Mass. 267; *Hinckley* v. *Thatcher*, 139 Mass. 477; *Winthrop* v. *Attorney General*, 128 Mass. 258; *Davis* v. *Barnstable*, 154 Mass. 224; *Bullard* v. *Chandler*, 149 Mass. 532, 534; *Quincy* v. *Attorney General*, 160 Mass. 431.

"'The Attorney General,' says Mr. Tudor, '. . . is the protector of all the persons interested in the charity funds. He represents the beneficial interest; consequently, in all cases in which the beneficial interest requires to be before the court, the Attorney General must be a party to the proceedings.' Tudor, Charities, (3d ed.) 323. . . . No proceedings in regard to a public charity, no matter how general the assent of those beneficially interested, would bind him if not made a party, nor can any proceeding in regard to a public charity . . . be invalidated by those beneficially interested, but having no peculiar and immediate interests distinct from those of the public. This duty of main-

dispute the validity of the gift to charity, the attorney general appears in defense of the gift.[72] He is a necessary party to proceedings for compromise under Revised Laws, c. 148, § 15;[73] but the trustees in whom the legal title will vest are also necessary parties, and, if omitted, the petition is defective.[74] He need not, however, conduct the case personally, but may delegate this duty to another attorney.[75]

§ 50. Trustees for charities, like trustees for individuals, are personally liable on their contracts,[76] but they may have recourse to the trust funds for indemnity against personal liability on contracts made within the scope of the powers conferred upon them by the trust instrument, or made in good faith and resulting in benefit to the trust estate.[77] In respect to its contractual obligations, a private charitable corporation stands no differently from a business corporation organized for profit. It is liable on all its contracts made within the scope of its powers. Thus an educational institution is liable in contract

taining the rights of the public is vested in the Commonwealth, and it is exercised . . . by the Attorney General." Devens, J., in *Burbank* v. *Burbank*, 152 Mass. 254, 256, 257.

[72] *McAlister* v. *Burgess*, 161 Mass. 269; *Weber* v. *Bryant*, 161 Mass. 400; *Darcy* v. *Kelley*, 153 Mass. 433.

[73] *Burbank* v. *Burbank*, 152 Mass. 254.

[74] *Ellis* v. *Hunt*, 228 Mass. 39.

[75] *Parker* v. *May*, 5 Cush. 336, 338; *McQuesten* v. *Attorney General*, 187 Mass. 185.

[76] Loring, Trustee's Handbook (3d ed.), pp. 77-78, and cases there cited.

[77] *Nelson* v. *Georgetown*, 190 Mass. 225; *Bradbury* v. *Birchmore*, 117 Mass. 569, 579.

See also opinion of Rugg, C.J., in *Frost* v. *Thompson*, 219 Mass. 360, 364-365.

to a teacher discharged without good cause, [78] and there have been cases where paying patients in charity hospitals have recovered in actions of contract on proving an express contract to furnish skilful treatment, and a breach of contract by negligent treatment. [79] An inmate of a charitable home, however, has no contractual right that will prevent expulsion for cause. [80]

§ 51. In respect to his recourse to properties devoted to public uses, administered by the commonwealth or cities or towns for public charitable purposes, a creditor is limited to the remedies which are permitted against such agencies of government. Hence buildings erected by towns for schoolhouses [81] or hospitals [82] cannot be subjected to mechanics' liens, and the same immunity has been held to extend to town libraries. [83] It is said to be against the policy of the law to permit such buildings, devoted to the welfare of the people at large and constituting instrumentalities of government, to be subjected to private claims. Whether the building is so devoted to public use as to be exempt in such a case does not depend on whether its maintenance is obligatory upon the municipality, but upon the nature and purpose of the use.

[78] See, for example, *Hall & Moody Institute* v. *Copass*, 108 Tenn. 582.

[79] See *Ward* v. *St. Vincent's Hospital*, 39 App. Div. 624.

[80] *Gooch* v. *Association for the Relief of Aged Females*, 109 Mass. 558.

[81] *Lessard* v. *Revere*, 171 Mass. 294; *Staples* v. *Somerville*, 176 Mass. 237.

[82] *Burr* v. *Mass. School for Feeble-Minded*, 197 Mass. 357.

[83] *Young* v. *Falmouth*, 183 Mass. 81.

§ 52. The trustee of a charitable trust is personally liable for loss due to a breach of trust in the same manner as a trustee for individuals. This liability is not barred by the general statute of limitations. [84] But if the trustee dies, the fact that the funds he has misused were held by him for charity does not prevent the short statute from barring the claim against his estate, [85] unless the trust funds can be traced; in which case they may of course be recovered, irrespective of the short statute. [86] Where a man leaves property by will to charity and the validity of the trust is not questioned or determined in the Probate Court, the statute of limitations begins to run as soon as the executor pays over the money, and a suit by the heirs to recover it from the payee is barred after six years. [87]

§ 53. A promise to give money for a charitable object does not in itself render the promissor liable for the amount promised. Such an undertaking lacks the essential elements of consideration and competent promisees, and is no more enforceable when it relates to a charity than when it concerns a business enterprise. [88] The fact that others subscribed, or were led to subscribe by the defendant's subscription, does

[84] *Attorney General* v. *Old South Society*, 13 Allen, 474, 496; *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 199; *Second Religious Society* v. *Harriman*, 125 Mass. 321, 329.

[85] *Attorney General* v. *Brigham*, 142 Mass. 248.

[86] *Attorney General* v. *Brigham*, 142 Mass. 248, 250.

[87] *Smith* v. *Town of Norton*, 214 Mass. 593.

[88] *Boutell* v. *Cowdin*, 9 Mass. 254; *Limerick Academy* v. *Davis*, 11 Mass. 113; *Bridgewater Academy* v. *Gilbert*, 2 Pick. 579.

not amount to consideration,[89] though suggestions to the contrary are found in some early cases.[90] If, however, the charitable undertaking is carried into execution, the promise of each subscriber, previously revocable, becomes a binding obligation;[91] and this is so not only in cases where the promise was made to an existing charitable institution,[92] but also where the undertaking contemplates the forming of an organization to carry out the charitable purpose, and such an organization is perfected by the appointment of a board having power to receive the subscriptions and proceed with the work.[93] The acceptance of the duties by the institution or board[94] and the incurring of obligations by them furnish the consideration, and the want of parties capable of enforcing the subscriptions is supplied.[95] It has been held in a

[89] *Cottage St. Church* v. *Kendall*, 121 Mass. 528, 530; *Martin* v. *Meles*, 179 Mass. 114, 119.

[90] *Trustees of Pembroke Church* v. *Stetson*, 5 Pick. 506, 508; *Watkins* v. *Eames*, 9 Cush. 537, 539.

[91] *Amherst Academy* v. *Cowls*, 6 Pick. 427, 434; *Ives* v. *Sterling*, 6 Met. 310; *Thompson* v. *Page*, 1 Met. 565; *Ladies' Collegiate Institute* v. *French*, 16 Gray, 196.

[92] *Williams College* v. *Danforth*, 12 Pick. 541; *Robinson* v. *Nutt*, 185 Mass. 345, 348.

[93] *Ives* v. *Sterling*, 6 Met. 310; *Thompson* v. *Page*, 1 Met. 565.

[94] *Ladies' Collegiate Institute* v. *French*, 16 Gray, 196; Holmes, C.J., in *Martin* v. *Meles*, 179 Mass. 114, 119.

[95] *Amherst Academy* v. *Cowls*, 6 Pick. 427, 438; *Thompson* v. *Page*, 1 Met. 565; *Ives* v. *Sterling*, 6 Met. 310.

Cf. Athol Music Hall Co. v. *Carey*, 116 Mass. 471.

In the very early cases—which are not wholly in harmony—the courts were firm, though reluctant, in refusing to enforce such promises previous to the actual incurring of expenditure. *Ives* v. *Sterling*, 6 Met. 310, 315. But, if possible, subscribers were held liable on the ground of

Georgia case that such a promise is not within the statute of frauds, and is binding though not in writing.[96]

subsequent ratification, such as by repetition of the promise, part payment, the giving of a note, or participation in the work. See *Farmington Academy* v. *Allen*, 14 Mass. 172; *Amherst Academy* v. *Cowls*, *Ives* v. *Sterling*, above.

The later cases hold it sufficient that the obligation to proceed with the work has been undertaken by a competent board.

[96] See *Y.M.C.A.* v. *Estill*, 78 S.E. Rep. 1075 (Ga.).

CHAPTER IV

TAXATION

Synopsis

§§ 54-72. (*a*) Of property.
73-76. (*b*) Of devises and legacies.
77-78. (*c*) On income.
79. (*d*) War-revenue law.

(*a*) *Of Property*

§ 54. Under the tax law of 1909 the following property devoted to charitable uses is exempt from taxation: "The personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated within this commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase. Such real or personal property shall not be exempt if any of the income or profits of the business of such corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes, nor shall it be exempt for any year in which such corporation wilfully omits to bring in to the assessors the list and statement required by section forty-one."[1] The

[1] Acts of 1909, c. 490, part 1, § 5, cl. 3.

Property of the United States and of the commonwealth is not subject to taxation in any form for general purposes or for local improvements. *Ibid.* cl. 1, 2.

Land of a city or town is exempt if devoted to public uses, but not otherwise. This is not because of any express

real and personal estate of incorporated agricultural and horticultural societies, Grand Army and other veterans' associations, are also exempt from taxation under certain conditions.[2] "Houses of religious worship owned by, or held in trust for the use of, any religious organization and the pews and furniture; but the exemption shall not extend to portions of such houses appropriated for purposes other than religious worship or instruction."[3] "Cemeteries, tombs and rights of burial, so long as they shall be dedicated to the burial of the dead."[4] By an act passed after the decision in the Milford cemetery case this last exemption was extended to include "All personal property held by cities, towns, religious societies and cemeteries, whether incorporated or unincorporated, or by the treasurer and receiver general of the commonwealth or by any corporation, for the perpetual care of graves, cemetery lots and ceme-

statutory provision, but rests upon the assumed intention of the legislature. *Somerville* v. *Waltham*, 170 Mass. 160; *Worcester County* v. *Worcester*, 116 Mass. 193; *Essex County* v. *Salem*, 153 Mass. 141; *Inhabitants of Wayland* v. *County Commissioners*, 4 Gray, 500.

The exemption is not confined to real estate actually used in performing governmental duties, but includes land held as part of a trust fund the income of which is devoted to public or charitable uses. *Burr* v. *Boston*, 208 Mass. 537.

[2] The holder of a mortgage on real estate of a charitable institution which is exempt under the section quoted is taxable in respect to the mortgage; for the statute which makes the mortgagee's interest taxable as real estate applies only in the case of real estate which is taxable, and, if the real estate is exempt, the loan on it is subject to taxation like other personal property. *Sweetser* v. *Manning*, 200 Mass. 378.

[3] Acts of 1909, c. 490, part 1, § 5, cl. 7.

[4] Acts of 1909, c. 490, part 1, § 5, cl. 8.

teries, for the placing of flowers upon graves, for the care or renewal of grave stones, monuments or tombs, and for the care and maintenance of burial chapels.'' [5]

§ 55. The great variety of purposes for which charitable corporations exist and the wide range of uses to which their property may be put have given rise to questions requiring judicial interpretation of several of the exempting clauses. These interpretations are here taken up in the order in which the several clauses occur in the statute. The burden of proving the right to exemption rests on the corporation claiming it. Any doubt must operate most strongly against the claimant.[6] ''*Personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated within this commonwealth.*'' Personal property includes, besides all kinds of tangible property and general funds, [7] an accumulating fund held in trust for the future benefit of such an institution and assessed to the beneficiary. [8] In the absence of special provisions in their charters, only those institutions that fall strictly in one or more of the classes designated in the act are entitled to exemption. The use of property for a literary, benevolent, charitable, or scientific purpose does not in itself entitle the property to exemp-

[5] Acts of 1913, c. 578.

[6] *Redemptorist Fathers* v. *Boston*, 129 Mass. 178. 180; *Boston Lodge of Elks* v. *Boston*, 217 Mass. 176.

[7] *First Universalist Society* v. *Bradford*, 185 Mass. 310, 312; *Masonic Education & Charity Trust* v. *Boston*, 201 Mass. 320, 326.

[8] *Williston Seminary* v. *County Commissioners*, 147 Mass. 427, 430; Acts of 1909, c. 490, part 1, § 23, cl. 6.

tion. The basis of the exemption is that the property is property of an institution incorporated for those purposes.[9] Accordingly, property held by individual trustees in trust generally for charitable, literary, benevolent, or scientific purposes is not exempt.[10] But if an institution belonging to one of the classes enumerated is expressly named as beneficiary of the trust, the property is exempt, though the legal title may be held by individual trustees, and only the equitable interest be in the corporation.[11] The words "incorporated within this commonwealth" refer to literary, benevolent, charitable, and scientific institutions as well as to temperance societies.[12] An institution chartered in another state is therefore not exempt; but a Massachusetts corporation does not lose its right to exemption by applying its fund outside the state.[13]

§ 56. It is safe to say that the classes enumerated include all corporations existing for charitable purposes in the wide legal sense.[14] Whether "benevolent" as used in the taxation statute is to be taken as synonymous with "charitable," or whether it is to be given a wider meaning, the court has left undecided.[15] If the meaning is wider, it is not suffi-

[9] See below, § 58.

[10] *Salem Marine Society* v. *Salem*, 155 Mass. 329.

[11] *Watson* v. *Boston*, 209 Mass. 18. Legislation regarding assessment of trustee or beneficiary is fully reviewed in Justice HAMMOND'S opinion in this case.

[12] Public Statutes 1882, c. 11, § 5, cl. 3.

[13] *Minot* v. *Winthrop*, 162 Mass. 113, 126; *Balch* v. *Shaw*, 174 Mass. 144, 149.

[14] See above, § 4.

BRALEY, J., in *New England Sanitarium* v. *Stoneham*, 205 Mass. 335; GRAY, J., in *Jackson* v. *Phillips*, 14 Allen, 539.

[15] *Franklin Square House* v. *Boston*, 188 Mass. 409.

ciently so to include a mutual-benefit society supported by compulsory contributions from its members, to whom its benefits are limited.[16] It is impossible to lay down a general rule as to where the line is to be drawn in the case of such societies. Each case will turn on its own facts, and the purposes of the institution as stated in its charter, articles of association, constitution, and by-laws—the objects it serves and the methods of administration.[17]

§ 57. "Scientific" covers institutions devoted either to science generally or to some department of science. It does not include a theosophical institution, the principal purpose of which is to promulgate a system of speculative philosophy and to obtain converts.[18] The word "literary" has not as yet been held to have a more extensive meaning than "charitable" as applied to literary institutions in cases concerning the validity of trusts.[19]

§ 58. *"Real estate owned and occupied by them or their officers for the purposes for which they are incorporated."* Neither ownership nor occupancy alone gives a right to exemption. Ownership and

[16] *Young Men's Temperance & Benevolent Society* v. *Fall River*, 160 Mass. 409.

Fraternal beneficiary associations incorporated under chapter 628, Acts of 1911, are exempt from taxes except upon real estate and office equipment.

[17] As to permanent funds made up from voluntary gifts and held by such institutions for the benefit of their needy members see *Minns* v. *Billings*, 183 Mass. 126, 128-129; *Little* v. *Newburyport*, 210 Mass. 414.

[18] *New England Theosophical Corporation* v. *Assessors of Boston*, 172 Mass. 60, 63.

[19] *New England Theosophical Corporation* v. *Assessors of Boston*, 172 Mass. 60, 63.

occupancy must coincide.[20] Land owned by a person not exempt, but leased to a charitable corporation, is taxable to the owner, though used and occupied solely for charitable purposes.[21] So is land owned by a charitable corporation, but leased to a non-charitable tenant.[22] The Old South Church was taxable while awaiting sale and leased to the United States government after the Boston fire.[23] If the real estate is owned by one charitable corporation, but occupied by another charitable corporation for the latter's charitable purposes, without pay, it is not exempt.[24] Except in the case of land purchased for removal, it must be occupied by the corporation or its officers in the sense that it is in actual use.[25] Thus land owned and awaiting sale by a corporation chartered to buy and improve real estate and to resell to working men at cost is not exempt.[26] By a recent

[20] The distinction between personal property and real estate in this respect is stated by Loring, J., in *First Universalist Society* v. *Bradford*, 185 Mass. 310, 312, in the following words: "Where the income of property is used to support the institution the property . . . is exempt . . . when invested in personal securities, but is taxable when invested in real estate."

[21] *Bates* v. *Sharon*, 175 Mass. 293. It is immaterial that the charitable corporation that occupies is also a remainderman and the present legal owner has only a life interest.

[22] *Pierce* v. *Cambridge*, 2 Cush. 611.

[23] *Old South Society* v. *Boston*, 127 Mass. 378.

[24] *St. James Educational Institute* v. *Salem*, 153 Mass. 185-187.

[25] See below, § 62.

[26] *Lynn Workingmen's Aid Assn.* v. *Lynn*, 136 Mass. 283. The same interpretation applies in the case of religious societies. See below, § 69; *Boston Society of Redemptorist Fathers* v. *Boston*, 129 Mass. 178.

statute land hereafter acquired for hospitals for the insane is not to be exempt unless with the consent of the local municipal authorities. [27]

§ 59. Furthermore, the occupancy must be directly and primarily for the purposes for which the institution is established. This requirement has led to some close distinctions in the decisions. Thus land held vacant around a hospital to prevent too close encroachment of slums, or for a recreation ground for patients, has been held exempt, [28] and the amount of land that may be so held is unrestricted, except that the officers of the institution owning it must act in good faith and not unreasonably. [29] So, also, land bought as a site for a new building, the erection of which has been commenced, though the old buildings are still in use. [30] A farm owned by an academy and used for raising produce to feed its students, and the livestock used in the farm work, are exempt. [31] So is a college athletic field or school playground. [32] A tract of woodland belonging to a college and used for instruction in forestry is probably exempt, notwith-

[27] Acts of 1911, c. 400.

[28] *Mass. General Hospital* v. *Somerville*, 101 Mass. 319.

[29] *Mass. General Hospital* v. *Somerville*, 101 Mass. 319, 322.

See also *Trustees of Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599; *Emerson* v. *Trustees of Milton Academy*, 185 Mass. 414.

[30] *New England Hospital for Women & Children* v. *Boston*, 113 Mass. 518.

[31] *Trustees of Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599; *Mt. Hermon Boys' School* v. *Gill*, 145 Mass. 139.

[32] *Emerson* v. *Trustees of Milton Academy*, 185 Mass. 414; *Amherst College* v. *Assessors of Amherst*, 193 Mass. 168, 178.

standing a part of its timber is sold, such sales being incidental to its main use as a means of instruction, and not for profit.[33] Real estate of historic interest owned by an incorporated society for promotion of historical research, and occupied principally for the purposes of the society, is exempt.[34]

§ 60. On the other hand, if the real estate is not occupied principally for the charitable purposes of the institution, it is taxable, even if it be occupied by the institution for subordinate or incidental purposes. Thus a charitable corporation organized to maintain a home may be taxed upon a building which was outgrown and no longer suitable for a home, though still used occasionally for trustees' meetings. To entitle the owner to exemption "the nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficent objects."[35] A building owned by a charitable and benevolent corporation, but used principally as a club for the social enjoyment of its members, is taxable.[36] A corporation chartered to provide model tenements to be leased at low rental to the poor, without profit and as a charity, may be taxed upon its buildings containing the suites that are leased; though the buildings were occupied in pursuance of the objects of the corpora-

[33] Opinions of Attorney General, 1909, p. 50.

[34] *Molly Varnum Chapter, D.A.R.*, v. *City of Lowell*, 204 Mass. 487.

[35] Rugg, C.J., in *Babcock* v. *Leopold Morse Home*, 225 Mass. 418.

[36] *Boston Lodge of Elks* v. *Boston*, 217 Mass. 176.

To the same effect see *Phi Beta Epsilon Corporation* v. *Boston*, 182 Mass. 457.

tion, the physical occupancy of them was not by the corporation.[37] But the letting of lodgings in a working girls' home owned by a charitable corporation and occupied by it for its administrative offices does not change the occupancy so as to render the building taxable.[38]

§ 61. An occasional letting of the buildings for hire does not forfeit the right to exemption so long as that use is merely occasional and the principal use is for the purposes of the institution.[39] But if the building is customarily let for hire, and occupancy by the institution is only occasional, it is not exempt, though the rents be used for the purposes of the institution.[40] Where parts of a building are used by a corporation for its own purposes and other parts are let for hire, and the two parts are distinct, the parts let for hire are taxable, and the value of the land and foundations for the purpose of taxation will be apportioned between the taxable and non-taxable parts of the building.[41]

§ 62. Buildings belonging to an institution and occupied by its officers or salaried employees are not exempt unless the purpose of their occupancy is directly and principally connected with the objects for which the institution exists.[42] Thus houses owned by a college and occupied by instructors and caretakers,

[37] *Charlesbank Homes* v. *Boston*, 218 Mass. 14.

[38] *Franklin Square House* v. *Boston*, 188 Mass. 409.

[39] *Chapel of the Good Shepherd* v. *Boston*, 120 Mass. 212; *Trustees of Phillips Academy* v. *Andover*, 175 Mass. 118, 121, 122.

[40] *Salem Lyceum* v. *Salem*, 154 Mass. 15.

[41] *Cambridge* v. *County Commissioners*, 114 Mass. 337.

[42] *Cambridge* v. *County Commissioners*, 114 Mass. 337.

etc., as a matter of personal convenience are not exempt.[43] But houses occupied by professors and their families as dwellings, if used for faculty meetings and other college work to such an extent that the court can find that to be the principal purpose for which they are owned, are exempt;[44] and buildings occupied by employees whose presence on the grounds is required for the proper administration of the work of the institution are probably exempt.[45] In such cases the fact that rent is charged is not conclusive. The real test is whether or not the principal purpose of the occupancy is directly connected with the work of the institution.[46] The question which use is primary and which is secondary is approached from the point of view of the institution, and not of the individual occupant.

§ 63. Dormitories, dining-halls, boarding-houses, gymnasiums, and athletic grounds owned by a college, if devoted to the use of students attending the college, are exempt.[47] But a college club-house at which members may board and lodge is not exempt, though

[43] *Williams College* v. *Williamstown*, 167 Mass. 505. *Amherst College* v. *Assessors of Amherst*, 173 Mass. 232.

[44] *Harvard College* v. *Cambridge*, 175 Mass. 145; *Trustees of Phillips Academy* v. *Andover*, 175 Mass. 118, 125; *Emerson* v. *Trustees of Milton Academy*, 185 Mass. 414; *Amherst College* v. *Assessors of Amherst*, 193 Mass. 168.

[45] *Mass. General Hospital* v. *Somerville*, 101 Mass. 319, 326; Opinions of Attorney General, 1909, p. 50.

[46] *New England Sanitarium* v. *Stoneham*, 205 Mass. 335; *Mass. General Hospital* v. *Somerville*, 101 Mass. 319; *Williams College* v. *Williamstown*, 167 Mass. 505.

[47] *Harvard College* v. *Cambridge*, 175 Mass. 145; *Phillips Academy* v. *Andover*, 175 Mass. 118; *Emerson* v. *Trustees of Milton Academy*, 185 Mass. 414.

the purposes of the club as stated in its charter may be literary.[48] On the one hand, "The statute is not to be construed narrowly but in a fair and liberal sense and so as to promote that spirit of learning, charity, and benevolence which it has always been one of the fundamental objects of the people of this State to encourage."[49] On the other hand, "An exemption from taxation is an extraordinary grace of the sovereign power, and is to be strictly construed. It must be made to appear plainly, either by the express words or necessary intendment of the statute."[50]

§ 64. The statutory exemptions apply only to taxes for the general purposes of government. They do not include special or local assessments, such as for street watering,[51] or for sewers,[52] or for laying out, widening, or improving streets,[53] or for other betterments. This applies to cemetery corporations organized under general laws,[54] but land perpetually dedicated to burial of the dead by legislative act forbidding its use for any other purpose has been held not generally subject to betterment assessments, because, not being salable, it has no market value on increase of which the assessment can be based.[55] The question is open,

[48] *Phi Beta Epsilon Corporation* v. *Boston*, 182 Mass. 457.

[49] Morton, J., in *Phillips Academy* v. *Andover*, 175 Mass. 118, at p. 125.

[50] Rugg, C.J., in *Milford* v. *County Commissioners*, 213 Mass. 162, 165.

[51] *Trustees of Phillips Academy* v. *Andover*, 175 Mass. 128.

[52] *Worcester Agricultural Society* v. *Worcester*, 116 Mass. 189.

[53] *Seamen's Friend Society* v. *Boston*, 116 Mass. 181; *Street Commissioners* v. *Boston Asylum*, 180 Mass. 485.

[54] *Garden Cemetery Corporation* v. *Baker*, 218 Mass. 339.

[55] *Mt. Auburn Cemetery* v. *Cambridge*, 150 Mass. 12.

however, whether, if the betterment is in fact beneficial to the land as a place of burial, the land may not be subject to assessment. Assessments for the support of fire districts are in nature a part of the general burden for support of government, and the exemption extends to such assessments.[56]

§ 65. *Real estate "purchased . . . with the purpose of removal thereto."* Before this clause was added to the statute[57] questions had arisen as to the status of vacant land on which the institution had begun to erect buildings meant for occupancy in the future. Such land, if the work of construction had been begun so as clearly to show an appropriation of it to the work of the institution, was held exempt;[58] but land which the institution merely intended to occupy at some indefinite future time was taxable.[59] The distinction is done away with under the present statute.

§ 66. *Not exempt "if any of the income or profits of the business . . . is divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes."* That provision was adopted in the Public Statutes[60] from earlier laws relating to the incorporation of religious, charitable,

[56] *Williams College* v. *Williamstown*, 219 Mass. 46; Revised Laws, c. 32, §§ 49-70.

[57] Acts of 1878, c. 214.

[58] *New England Hospital* v. *Boston*, 113 Mass. 518.

[59] *Boston Society of Redemptorist Fathers* v. *Boston*, 129 Mass. 178.

See, as to similar land of religious societies, § 69, below.

[60] Public Statutes 1882, c. 11, § 5, cl. 3.

and educational institutions. [61] The words are clearly limited to profits paid out as such. They have nothing to do with receipts used for maintenance or expansion. Taking pay from people who can afford to pay does not take the institution out of the exempted class, so long as its controlling purpose is charitable and all its income is used in furtherance of that purpose. [62]

§ 67. "*Wilfully omits to bring in to the assessors the list and statement required by section forty-one.*" [63] Mere neglect to file the statement does not take away the right to exemption. The omission must be intentional and wilful. The question is one of fact, and the burden of proof is on the municipality. [64]

§ 68. Up to the present time no cases have been taken to the Supreme Judicial Court that concerned the provisions relating to agricultural and horticultural societies, Grand Army of the Republic, or veterans' associations. The absence of limitation of the exemption in the case of agricultural societies and the limitations in the case of horticultural societies and other associations are clear from the language of the statute.

[61] Acts of 1874, c. 375, repealing General Statutes, c. 32.

[62] *New England Sanitarium* v. *Stoneham*, 205 Mass. 335; *Franklin Square House* v. *Boston*, 188 Mass. 409, 410.

[63] Returns must also be made to the state board of charity, failing which for two consecutive years the corporation may be dissolved. Revised Laws, c. 84, § 14, as amended by Acts of 1913, c. 82.

[64] *Masonic Education & Charity Trust* v. *Boston*, 201 Mass. 320, 326; *Milford* v. *County Commissioners*, 213 Mass. 162.

§ 69. The statutory exemption in respect to real estate of religious institutions is less definite, but narrower, than in the case of charitable, educational, benevolent, and scientific institutions.[65] It is confined to "Houses of religious worship owned by, or held in trust for the use of, any religious organization and the pews and furniture." All other property, real or personal, is taxable, though the income is used to support religious worship. "Houses of religious worship" means ordinary church buildings owned and used in the usual way for religious worship.[66] The exemption includes also so much of the ground on which the church stands as is necessary for its convenient use.[67] A church under construction has been held exempt,[68] but land bought for a church site is not exempt, though commencement of the building is delayed only by lack of funds;[69] and the erection of a temporary church building will make only so much of the land exempt as is required by the temporary building.[70] The act should be construed as if the words "owned by, or held in trust for the use of, any religious organization" were followed by the words "occupying and using them as such."[71] Buildings owned by a religious society,

[65] See above. § 55.

[66] KNOWLTON, C.J., in *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28.

[67] *Lowell Meetinghouse* v. *Lowell*, 1 Met. 538.

[68] *Trinity Church* v. *Boston*, 118 Mass. 164. In this case the work had progressed no further than driving piles for foundations. There is a dissenting opinion by WELLS, J.

[69] *All Saints Parish* v. *Brookline*, 178 Mass. 404.

[70] *All Saints Parish* v. *Brookline*, 178 Mass. 404, BARKER, J., dissenting.

[71] KNOWLTON, C.J., in *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28, 31.

but let to others, are not exempt.[72] And where a trust exists, there must be an organization as beneficiary; a mere religious purpose is not sufficient.[73] The statute further expressly excludes from the exemption any parts of such edifices appropriated for purposes other than religious worship or instruction. Thus a parsonage is not exempt.[74] Parts of a church building let for shops are taxable.[75] And so is a church building temporarily let for secular purposes.[76] A fund for the support of a minister is not exempt.[77]

§ 70. Cemeteries, tombs, and rights of burial are expressly exempt. Cemetery corporations, however, are not "charitable corporations" within the meaning of clause 3, and therefore, until a recent amendment of the statutes, their equipments used in maintenance of their grounds and their invested funds were taxable.[78] The exemption is now extended to personal property held by them for the care of

[72] KNOWLTON, C.J., in *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28.

[73] *Salem Marine Society* v. *Salem*, 155 Mass. 329.

[74] *Third Congregational Society* v. *Springfield*, 147 Mass. 396.

[75] *Lowell Meetinghouse* v. *Lowell*, 1 Met. 538.

In a New York case the basement of a house of worship containing tubs which were used in certain religious rites, and which were also let for hire to persons desiring to use them for baths, was held taxable under a similar statute. The report of the case does not state the amount of income derived from this source. *Congregation Kal Israel* v. *City of New York*, 1 N.Y. Supp. 36.

[76] *Old South Society* v. *Boston*, 127 Mass. 378.

[77] *Trustees of Greene Foundation* v. *Boston*, 12 Cush. 54, 58; *Trustees of Ministerial Fund* v. *Gloucester*, 19 Pick. 542.

[78] *Milford* v. *County Commissioners*, 213 Mass. 162.

graves, lots, monuments, etc.[79] The Proprietors of Mt. Auburn Cemetery are not taxable in Boston, where they have their business offices, the maintenance of the cemetery at Mt. Auburn being their principal function, and the business done at Boston being subsidiary. It does not follow that the same is true of other cemetery corporations, that of Mt. Auburn being created and regulated by special acts.[80]

§ 71. Whichever class the corporation belongs to, exemption may be claimed only for property within the amount which the corporation can lawfully hold. Real estate held *ultra vires* in excess of that amount is taxable, though the buildings be used for purposes that would otherwise entitle them to exemption. One seeking exemption must have a title that the state is bound to recognize.[81]

§ 72. In the case of corporations organized under special act the exemptions may be extended or curtailed by special provisions differing from those of the general law. Such provisions, whether they exempt more or less than is exempt by the general law, are controlling. Thus, if the charter fixes a limit to the amount of property that shall be exempt, any excess over that amount, though owned and used for the purposes of the institution, is taxable.[82] On the other hand, the exemption may be extended by the charter—as, for example, to real estate leased for

[79] Acts of 1913, c. 578.

[80] *Collector of Taxes* v. *Proprietors of Mt. Auburn Cemetery*, 217 Mass. 286.

[81] *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28.

[82] *Evangelical Baptist Society* v. *Boston*, 204 Mass. 28.

mercantile uses.[83] The exemption may be made to include special and local assessments as well as general taxes.[84] The charter may provide that none of the property shall be exempt, and, if it does so, the corporation can derive no benefit from the exemptions in the general act.[85]

(*b*) *Of Devises and Legacies*

§ 73. Gifts by will and gifts made to take effect at death "to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation, or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of a city or town within this commonwealth for public purposes," are not sub-

[83] The charter of the Old South Association, organized to preserve the Old South Church, provided that the "meeting-house and land shall be exempt from taxation while said meeting-house shall be used for" the memorial purposes of the corporation. It was held, in an action for damages for taking a part of the land for the Washington Street tunnel, that the exemption was to be considered in assessing damages, notwithstanding a part of the land taken had been let for mercantile purposes, the income being devoted strictly to the uses of the Society. *Old South Association* v. *Boston*, 212 Mass. 299.

[84] *President & Fellows of Harvard College* v. *Aldermen of Boston*, 104 Mass. 470.

If at the time of its acquisition the real estate sought to be taxed did not exceed the amount which by charter is exempt, that real estate cannot be taxed either because of increase of value or because of acquisition of other lands in excess of the amount exempt. *President & Fellows of Harvard College* v. *Aldermen of Boston*, 104 Mass. 470, at pp. 488-489.

See also *Hardy* v. *Waltham*, 7 Pick. 108.

[85] *Northampton* v. *County Commissioners*, 145 Mass. 108.

ject to succession taxes under the present law.[86] The exemptions in the present act form three groups, according to the character of the donee and its relation to the gift. In the first group are gifts "to or for the use of charitable, educational or religious societies or institutions," the property of which is exempt from taxation. This class embraces a different set of institutions from those exempt from property taxes. In respect to exemption from property taxes, literary, benevolent, charitable, and scientific institutions are treated as one class, and entitled to certain exemptions, and religious societies as another class, entitled to somewhat different exemptions. In respect to the legacy tax, the test is not the form in which the gift passes or the purposes to which it is to be devoted. The test is whether the property of the devisee is exempt from taxation for the general support of government. If it is exempt, the devise is exempt. If it is not exempt, the devise is taxable. Therefore, in the case of a religious society, as its house of worship is supposed to be its principal property, a devise of a house to be used as a parsonage is exempt from succession tax, though it will be subject to local taxes when used by the society.[87] A gift to a town for the erection and maintenance of a free public library has been held not taxable, such a library being an "educational or charitable institu-

[86] Acts of 1909, c. 490, part 4, § 1, as amended by Acts of 1909, c. 527, § 1.

For history of the statutes on this subject see Nichols, Taxation in Massachusetts, § 140.

[87] *First Universalist Society in Salem* v. *Bradford*, 185 Mass. 310.

tion." [88] Even before the passage of the amending act imposing a territorial limitation, the exemption was held not to extend to institutions outside the state, the words "exempt by law" being held to mean exempt by Massachusetts law, and not by the law of the institution's domicile. [89] But if the institution named as a legatee is a Massachusetts institution whose property is exempt from general taxation by Massachusetts law, a gift to it is free from legacy tax, though its field of activity extends into other states. [90]

§ 74. In the second group are gifts "for or upon trust for any charitable purposes, to be carried out within this commonwealth." The term "charitable purposes" in this clause is undoubtedly co-extensive with that adopted by the courts in the cases reviewed in chapter 1 of these notes. The decisions under the narrower exemptions of preceding acts must be read in connection with the statutes that apply to them. Until the present exemption was added, in 1906, an ordinary gift by will for objects of charity was taxable, since the word "institution" as used in the act could not properly be stretched to include gifts to individual trustees for general charitable purposes.[91]

[88] *Essex* v. *Brooks*, 164 Mass. 79, 83.

[89] *Minot* v. *Winthrop*, 162 Mass. 113, 126; *Rice* v. *Bradford*, 180 Mass. 545.

Bowdoin College, though incorporated under Massachusetts law before the passage of the Separation Act of 1819, is not an "institution incorporated within the Commonwealth" within the meaning of the act. *Batt* v. *Treasurer & Receiver General*, 209 Mass. 319; *Rice* v. *Bradford*, 180 Mass. 545.

[90] *Balch* v. *Shaw*, 174 Mass. 144.

[91] *Hooper* v. *Shaw*, 176 Mass. 190.

After the amendment of 1906, ordinary trusts for charitable purposes within the state became exempt. The exemption has never been extended to trusts for charitable purposes outside the state. A gift to a town in another state for the support of its poor is taxable; so is a gift to individual trustees, living in Massachusetts, for a purpose to be carried out in a foreign state or country.[92] The taxability of the gift is determined by the situation existing at the testator's death, and liability to tax cannot be escaped by later organizing a corporation under Massachusetts law to administer the gift.[93]

§ 75. Gifts "to or for the use of a city or town within this commonwealth for public purposes" form the third group under the present act. Up to the present time there have been no decisions of the Supreme Judicial Court relating to this clause in the act. The term "public purposes" would seem to be of very general application.

[92] *Davis* v. *Treasurer & Receiver General*, 208 Mass. 343.

[93] *Pierce* v. *Stevens*, 205 Mass. 219.

But where a fund was created by deed and placed in the hands of trustees to be applied to such charitable purposes as should be designated by a board of persons named in the deed, and the board organized themselves into a corporation, to which they appointed the fund, and then, acting through the corporation, made gifts to various charitable institutions outside the state, the entire fund was held exempt. The ground of the decision was that the board were not donees, but had merely a power of appointment, pending the execution of which there was no gift to any one; and that, when the appointment was made, the effect was the same as if the corporation had been named as donee in the deed. *Balch* v. *Shaw*, 174 Mass. 144.

§ 76. The federal estate-tax law of September 8, 1916, allows no deduction on account of legacies for charitable purposes in determining the amount on which the tax shall be levied.

(c) *Income Taxes*

§ 77. Corporations and associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, are exempt from taxation under the federal income-tax law of October 3, 1913.[94] This exemption remained unchanged under the law of September 8, 1916. The exemption also extends to fraternal-benefit societies, agricultural and horticultural societies, chambers of commerce, civic leagues, and many other organizations which are not charitable in the legal sense and whose property is not exempt from local taxation.

§ 78. Under the Massachusetts income-tax law charitable corporations are not subject to tax upon the income derived from property that is not subject to taxation under chapter 490 of the Acts of 1909, but are subject to tax on the income derived from property that is taxable under the provisions of that act.[95]

(d) *War-Revenue Law*

§ 79. Athletic games, theatrical performances, etc., given solely for the benefit of religious, educational, or charitable institutions are excluded from the operation of the federal war-revenue law imposing a tax

[94] Federal income-tax law, § II G (*a*).
[95] Acts of 1916. c. 269, § 6 (C).

upon admissions. It is essential that no part of the proceeds be divisible among stockholders or members of the association. The exemption is construed in a liberal spirit. It has been held to extend to games given to raise funds for athletic equipment at military training camps, and will probably be held to embrace almost any entertainment given to further the welfare, comfort, or efficiency of those engaged in the military or naval service of the United States.[96]

[96] War-revenue law of Oct. 3, 1917, § 700.

CHAPTER V

LIABILITY OF CHARITABLE INSTITUTIONS FOR TORTS

Synopsis

§§ 81-84. Massachusetts cases.
85-90. Conflicting theories as to reason for exemption.
91-93. Governmental agencies.
94. Unincorporated and individual trustees.
95. Misuse of real estate.

§ 80. The law as to the liability of charitable institutions for torts is to some extent in process of development. In certain types of cases the institution is almost everywhere held exempt from liability. In other types there is a conflict of authority. Where the institution has been held exempt, the decisions have been based upon varying theories—theories which sometimes are not sound when applied to facts differing from those of the case decided.

§ 81. The first Massachusetts case where the subject was considered is *McDonald* v. *Massachusetts General Hospital,* 120 Mass. 432. In that case it was held that a patient in a public charitable hospital could not recover from the hospital corporation for injuries resulting from negligent treatment by a house officer. The ground of the decision was that the corporation's funds, being held upon trust for the maintenance of the hospital, could not be diverted from that purpose to satisfy a judgment recovered by an individual. If this reasoning is followed, charitable trusts and corporations would be immune from liability in all cases, [1] no matter who the person

[1] This theory has been followed in several states. See,

is that is hurt or what the nature of the act that caused the injury.

§ 82. In *Davis* v. *Central Congregational Society*, 129 Mass. 367, a religious society invited members of other churches to attend a conference in its church building. The plaintiff, a member of another church,

for example, *Fire Insurance Patrol* v. *Boyd*, 120 Penn. St. 624; *Perry* v. *House of Refuge*, 63 Md. 20; *Abston* v. *Waldon Academy*, 118 Tenn. 24; *Williams* v. *Louisville Industrial School*, 95 Ky. 251; *Parks* v. *Northwestern University*, 218 Ill. 385; *Fordyce* v. *Women's Library Association*, 79 Ark. 550; *Adams* v. *University Hospital*, 99 S.W. Rep. 453 (Mo.). Some of these decisions could have been based on other grounds.

Of the English cases sometimes cited as supporting this theory some are not authorities, for the reason that the defendant institutions were quasi-public bodies performing governmental duties. *Dudden* v. *Guardians of the Poor*, 1 H. & N. 627; *Coe* v. *Wise*, L.R. 1 Q.B. 711; *Levingston* v. *Guardians of the Poor*, 2 Ir. Rep. C.L. 202, 219.

For analysis and discussion of the leading English cases see opinion of LOWELL, J., in *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. Rep. 294.

See also *Donaldson* v. *General Public Hospital of St. John*, 30 N.B. 279.

It was suggested in a Rhode Island case that the general funds of the institution may be reached, immunity being confined to its buildings and grounds. *Glavin* v. *R.I. Hospital*, 12 R.I. 411, 428-429. This distinction has not been generally adopted. Soon after the decision in this case a statute was passed providing that no charitable hospital should be liable for neglect, carelessness, want of skill, or malicious acts of any agent, officer, or employee. General Laws of Rhode Island, 1896, p. 538.

In a Pennsylvania case, a patient suing for injuries caused by the negligence of a nurse expressly limited her claim to the income derived from paying patients. It was held the plaintiff had no greater right to satisfaction from such income than from other property of the hospital. *Gable* v. *Sisters of St. Francis*, 227 Pa. St. 254, 261.

fell over an unguarded wall on the defendant's grounds. The court held she could recover. In a recent case this decision was said not to be an authority, because the point that the defendant was a charity was not raised or passed upon. [2] In *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, it was held that an employee of a painter under contract to paint a church could recover from the society for injuries sustained on a defective staging furnished by the society. In *Smethurst* v. *Barton Square Church*, 148 Mass. 261, it was held that a passer-by in the street could recover for injuries caused by a snow-slide from the roof of a church. The point that the defendant was a charitable corporation was not made in either of these cases. [3]

§ 83. In *Farrigan* v. *Pevear*, 193 Mass. 147, an employee in the engine-room of a building owned and occupied by a charitable institution was injured

[2] *Farrigan* v. *Pevear*, 193 Mass. 147, 149.

See, however, opinion of Colt, J., in *Davis* v. *Central Congregational Society*, 129 Mass., at p. 372, where the following occurs: "The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society." It is to be observed that at the date of this case, the general funds of a church were not considered as held upon a charitable trust.

See also *Basabo* v. *Salvation Army*, 85 Atl. Rep. 120 (R.I.).

[3] See above, § 11.

See also *Osgood* v. *Rogers*, 186 Mass. 238, 240; *Sears* v. *Attorney General*, 193 Mass. 551; *Chapin* v. *Holyoke Y.M.C.A.*, 165 Mass. 280.

through negligence of the defendant's employees for which an ordinary employer would have been liable. The court held that, as the defendant was a public charitable institution, the doctrine *respondeat superior* did not apply, and that the defendant was not liable. In *Thornton* v. *Franklin Square House,* 200 Mass. 465, a charitable corporation conducting a home for girls was held exempt from liability for injuries sustained by an inmate on a defective fire-escape. The exact cause and circumstances of the accident were not in evidence.[4] In *Conklin* v. *John Howard Industrial Home,* 224 Mass. 222, it was held that a charitable corporation which provided a temporary home for discharged prisoners and a wood-yard to give them work while awaiting employment, maintained in part by the proceeds of the wood sawed and in part by income from invested funds, the deficiency in operating expenses being met by voluntary contributions, was not liable to an inmate injured while operating a machine in the yard.

§ 84. On the other hand, in *Holder* v. *Massachusetts Horticultural Society,* 211 Mass. 370, an employee of an educational institution was injured through negligence of a superintendent while performing duties in a building owned by the institution, but let for hire and occupied for purposes not connected with the charity. It was held that he could

[4] A fireman cannot recover for injury sustained in such a building. *Loeffler* v. *Trustees of Pratt Hospital,* 100 Atl. Rep. 301 (Md.). This case was decided on the trust-fund theory. Firemen are generally held to be mere licensees having no rights against the owners of buildings entered in the course of duty. 29 Cyc. 452.

recover. The same result was reached in an earlier case, where an employee of a tenant was injured in a building let by Harvard College for mercantile purposes. The defense that the defendant was a charitable institution was not raised.[5]

§ 85. As the courts have adopted different theories of the basis of exemption, it is impossible to forecast the outcome of cases differing in their essential facts from those decided, without considering more carefully the grounds of the decisions. There are two important points of distinction: first, the relation of the parties; second, the character of the act of negligence, whether it is the negligence of a paid employee or negligence that can be brought home directly to the institution. We will consider first the relation of the parties. If the plaintiff is a person receiving aid from the institution and the injury results from the negligence of an employee engaged in administering that aid, the rule is general that the plaintiff cannot recover.[6] And it makes no difference whether the plaintiff was receiving the services of the institution as an act of charity or whether he paid a nominal or substantial fee—assuming, of course, that the income

[5] *Stewart* v. *Harvard College*, 12 Allen, 58.

In *Bishop* v. *Trustees of the Bedford Charity*, 1 El. & El. 697, 714, it was taken for granted that a charitable corporation owning a house let for hire was liable to the child of a tenant for injuries received upon the premises; but the plaintiff failed to recover on another ground.

[6] See notes to § 81.

McDonald v. *Massachusetts General Hospital*, 120 Mass. 432; *Wharton* v. *Warner*, 135 Pac. Rep. 235, 238; *Thornton* v. *Franklin Square House*, 200 Mass. 465; *Van Ingen* v. *Jewish Hospital of Brooklyn*, 164 N.Y. Supp. 832.

so derived goes to the support of the institution, and not to any individual.[7] The result is the same whether the ground of the decision be the inviolability of trust funds,[8] or the rule stated in *Farrigan* v. *Pevear*,[9] or the theory that the relation between the plaintiff and his benefactor is such as to give rise to an implied agreement to waive liability.[10]

§ 86. It has been held that a paying patient may recover from a charitable hospital for breach of an express contract.[11] The contrary has been held in Nebraska and Alabama; the Nebraska court holding that the hospital is not liable for negligence of a nurse, even though the plaintiff paid full value for treatment, and that it makes no difference whether there was an express contract, an implied contract, or no contractual relation at all.[12] The question was new in Alabama, and after a very careful review of decisions the court concluded that the theories upon which the rules of exemption are founded do not "measure with the rule of reason or sound logic,"

[7] See above, §§ 16, 17.

[8] *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432. For criticism of this theory see LOWELL, J., in *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. Rep. 294; *Hordern* v. *Salvation Army*, 199 N.Y. 233, 238; *Bruce* v. *Central Church*, 147 Mich. 231, 252-256.

[9] *Hearns* v. *Waterbury Hospital*, 66 Conn. 98, 112.

[10] *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. Rep. 294; *Hordern* v. *Salvation Army*, 199 N.Y. 233; *Bruce* v. *Central Church*, 147 Mich. 230; *Magnuson* v. *Swedish Hospital* (Wash.), 169 Pac. Rep. 828.

[11] *Armstrong* v. *Wesley Hospital*, 170 Ill. App. 81; *Ward* v. *St. Vincent's Hospital*, 39 App. Div. (N.Y.) 624; *Roche* v. *St. John's Riverside Hospital*, 160 N.Y. Supp. 401.

[12] *Duncan* v. *Nebraska Sanatorium*, 137 N.W. Rep. 1120.

except the implied-waiver theory, and limits that defense to cases of charity patients, and holds the hospital liable to paying patients.[13] In a recent case in Massachusetts[14] a paying patient at a private hospital, to which she had gone for an operation, was robbed by a nurse while under ether. The court held that the hospital owed the patient a duty under its contract to supply a competent nurse, and that it was liable for breach of this contract. The question of contractual liability has not been presented in Massachusetts in any case involving a charitable hospital.

§ 87. If the act of negligence can be brought home to the institution itself, it has been suggested, following the rule in the steamship-surgeon cases, that the defendant may be liable. Thus a hospital corporation may be liable if proved to have negligently retained in its employment surgeons and nurses known to be incompetent or unskilful.[15] Again, if injury

[13] *Tucker* v. *Mobile Infirmary Assn.*, 191 Ala. 572.

[14] *Vannah* v. *Hart Private Hospital*, 228 Mass. 132.

[15] *Glavin* v. *Rhode Island Hospital*, 12 R.I. 411, 424; *O'Brien* v. *Cunard Steamship Company*, 154 Mass. 272; *Illinois Central Railway* v. *Buchanan*, 31 Ky. App. 722; *Goodman* v. *Brooklyn Hebrew Orphan Asylum*, 165 N.Y. Supp. 949.

In *Paterlini* v. *Memorial Hospital Association*, 232 Fed. Rep. 359, the plaintiff alleged negligence "in keeping poisons in such a manner as to allow a nurse, whether careful or negligent, to make a mistake." The court (C.C.A. 3d Cir.) overruled a demurrer, but stated this was done without expressing an opinion on the point of law involved, which was too important to decide on the mere allegations of the pleadings. The plaintiff failed to recover on the merits. 241 Fed. Rep. 429.

On the contrary, in a recent New York case denying a

is caused by a dangerous condition of the defendant's premises due to neglect of a duty cast upon it as owner, it would not seem unreasonable to hold the defendant responsible, even though the plaintiff be a person accepting its charity.[16] Or again, suppose the plaintiff, though a beneficiary of the charity, suffers injury in no way incident to his relation to the charity—as if, for example, a student in college, while rightfully about his private business, is injured in a dangerous building owned by the college but leased for mercantile purposes: On the theory of *Powers* v. *Mass. Homeopathic Hospital*, 109 Fed. 294, it would seem that he ought to recover, for the implied waiver would hardly extend to matters lying outside the giving and acceptance of the charity;[17] and it would not seem that recovery would be precluded by the

student, who had paid the regular tuition fees, the right to recover for injuries suffered in a laboratory experiment, it was said that the defense of implied waiver extends to all claims of negligence, not only of servants, but of the institution itself in the failure to perform duties that cannot be delegated, such as the selection of employees. *Hamburger* v. *Cornell University*, 166 N.Y. Supp. 46.

[16] *Davis* v. *Central Congregational Society*, 129 Mass. 367.

See *Farrigan* v. *Pevear*, 193 Mass. 147, 149.

The point was left undecided in *Thornton* v. *Franklin Square House*, 200 Mass. 465, 467.

It was held that the plaintiff could not recover in *Currier* v. *Trustees of Dartmouth College*, 117 Fed. Rep. 44, 47, 49.

In *Adams* v. *University Hospital*, 99 S.W. Rep 453 (Mo.). and *Abston* v. *Waldon Academy*, 118 Tenn. 24, where the defendant was held exempt, the decision was based on the trust-fund theory.

[17] But see *Bruce* v. *Central Church*, 147 Mich. 230.

decision in *Farrigan* v. *Pevear,* because the negligence is not that of an employee engaged in administering the charity, from whose duties no pecuniary gain results to the employer; [18] and his right to recover would seem to be clear under *Holder* v. *Mass. Horticultural Society.*

§ 88. Where the plaintiff is an employee of the defendant the law as to his right to recover for injury is settled in Massachusetts by two recent decisions. The first of these held that an employee in a building owned by a charitable institution and occupied for the purposes of the charity could not recover damages from the employer for injuries due to negligence of other employees, for which an employer would ordinarily be liable. [19] The second holds that an employee in a building owned by a charitable institution, but let to a non-charitable tenant for hire, can recover. [20]

§ 89. Where the plaintiff is a stranger to the charitable corporation the decisions are not in harmony. In *Smethurst* v. *Barton Square Church* [21] a

[18] *Stewart* v. *Harvard College,* 12 Allen. 58.

[19] *Farrigan* v. *Pevear,* 193 Mass. 147.

In a leading New Hampshire case it was held recently that a nurse, employed at a charity hospital, who contracted a contagious disease from a patient assigned to her care without warning as to the nature of his sickness could recover damages against the hospital. *Hewitt* v. *Women's Aid Hospital Association,* 73 N.H. 556.

[20] *Holder* v. *Massachusetts Horticultural Society,* 211 Mass. 370.

If the enterprise in which an accident occurs is *ultra vires,* the charitable character of the defendant is no defense. Thus a school is liable for injury suffered on a ferry which its charter gives no power to operate. *Nims* v. *Mt. Hermon Boys' School,* 160 Mass. 177, 180.

[21] 148 Mass. 261.

man whose horse was struck by a snowslide from the roof of a church was allowed to recover damages from the society that owned the church; and in *Mulchey* v. *Methodist Religious Society*[22] an employee of a contractor engaged in painting a church recovered for injury due to a fall from a defective staging furnished by the owners of the church. The point that the defendant was a charity was not raised in either case, and they were decided before general church uses were regarded as public charities; and for both reasons the cases cannot be considered as authorities.

§ 90. If the only limit to the rule of *Farrigan* v. *Pevear* is that which was set in *Holder* v. *Massachusetts Horticultural Society*, the law in Massachusetts in cases where the plaintiff is a stranger is contrary to that in most jurisdictions, except those where the courts have adhered to the trust-fund theory of general immunity. There have been cases in other states where a person lawfully in a public street was allowed to recover for injuries caused by the negligence of an ambulance driver employed by a charity hospital and responding to an accident call.[23] Independent contractors and their employees, injured while repairing buildings belonging to charitable institutions and used for their charitable purposes, have been allowed to recover,[24] and passers-by have re-

[22] 125 Mass. 487.

[23] *Basabo* v. *Salvation Army*, 85 Atl. Rep. 120 (R.I.); *Kellogg* v. *Church Charity Foundation*, 203 N.Y. 191; *Van Ingen* v. *Jewish Hospital of Brooklyn*, 164 N.Y. Supp. 832.

[24] *Hordern* v. *Salvation Army*, 199 N.Y. 233; *Bruce* v. *Central Methodist Episcopal Church*, 147 Mich. 230; *Gartland* v. *New York Zoölogical Society*, 135 App. Div. 163.

covered for injuries on defective sidewalks adjacent to premises of charitable institutions.[25] The exception to the rule of exemption established by the *Holder* case is logical and in line with the decisions in other states. In New York this question of liability to strangers has come up in several phases, and after some uncertainty the courts have arrived at certain principles which may be considered as established for that state. Immunity from liability is restricted to those cases where the plaintiff is a recipient of the charity;[26] and the basis of the immunity in those cases is an implied waiver of liability. The New York courts refuse to accept the trust-fund theory. There is no exemption from liability to employees and strangers;[27] and the doctrine that the rule *respondeat superior* does not apply is limited to cases of municipal corporations.[28] It is not the purpose of these notes to go very deeply into the theories on which the decisions are based, but rather to state in a short form what has been decided and is the law of the state, and leave the reader to his own conclusions as to new questions. The law of Massachusetts, so far as it has been made, is established by the decisions

[25] *Blacchinska* v. *Howard Mission*, 56 Hun, 322.

[26] *Schloendorff* v. *New York Hospital*, 211 N.Y. 125.

[27] *Kellogg* v. *Church Charity Foundation*, 203 N.Y. 191, affirming 128 App. Div. 214; *Van Ingen* v. *Jewish Hospital of Brooklyn*, 164 N.Y. Supp. 832; *Gartland* v. *New York Zoölogical Society*, 135 App. Div. 163; *Hordern* v. *Salvation Army*, 199 N.Y. 233, reversing 131 App. Div. 900.

The case of *Noble* v. *Hahnemann Hospital*, 112 App. Div. 663, must be considered as overruled by the later cases.

[28] *Van Ingen* v. *Jewish Hospital of Brooklyn*, 164 N.Y. Supp. 832.

quoted. The general tendency of decisions in other states is to limit the immunity to cases where the plaintiff is the recipient of the charity.

§ 90*a*. Public charitable institutions are not within the provisions of the Workmen's Compensation Act. The fact that the expressed exception is confined to domestic servants and farm laborers does not give rise to an inference that the legislature intended to include by implication all other workmen by whomsoever employed, or to change the established law that charitable institutions are immune from liability to their employees.[28a]

§ 91. Another class of cases, resting on different grounds of exemption, is that where the defendant is a municipal corporation. A municipal corporation is not generally liable for injuries suffered in a school, hospital, or other public building resulting from negligence of the municipal corporation or its agents. There are, however, some exceptions to this general rule. The cases are fully reviewed in the opinion of Rugg, C.J., in the recent case of *Bolster* v. *Lawrence*, 225 Mass. 387.[29] The principles on which they rest are well stated in the language of the opinion: "The municipality, in the absence of special statute imposing liability, is not liable for the tortious acts of its officers and servants in connection with the gratuitous performance of strictly public functions, imposed by mandate of the Legislature or undertaken volun-

[28a] *Zoulalian* v. *New England Sanatorium*, S.J.C. May 22, 1918; Acts of 1911, c. 751.

[29] In that case the city of Lawrence was held not to be liable for the collapse of a public bathing pier maintained under Revised Laws, c. 25, §§ 20, 21.

tarily by its permission, from which is derived no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefited by way of compensation for use or assessment for betterments. A city or town is not liable, therefore, for negligent or tortious acts in the conduct of schools, [30] the construction of schoolhouses, [31] the maintenance of a city hall solely for public uses, [32] of shade trees, [33] of a house of industry, [34] of a public park [35] . . . ; nor is it answerable for the acts of . . . those in charge of celebrations, playgrounds and public amusements. [36] . . ."

§ 92. "On the other hand a municipality is answerable for the acts of its servants or agents in the conduct of functions voluntarily undertaken for its own profit and commercial in character, or to protect its corporate interests in its own way. [37] Thus it is liable for the acts of agents specially selected and deputed to repair highways to the exclusion of those public officers provided by the law, on the ground that it is protecting by *quasi* private instrumentalities its pecuniary interest growing out of statutory liability for defects in highways. [38] It is liable, on

[30] *Hill* v. *Boston*, 122 Mass. 344.

[31] *Howard* v. *Worcester*, 153 Mass. 426.

[32] *Kelley* v. *Boston*, 186 Mass. 165.

[33] *Donohue* v. *Newburyport*, 211 Mass. 561.

[34] *Curran* v. *Boston*, 151 Mass. 505.

[35] *Holleran* v. *Boston*, 176 Mass. 75.

[36] *Kerr* v. *Brookline*, 208 Mass. 190; *Higginson* v. *Treasurer & School House Commissioners of Boston*, 212 Mass. 583, 588.

[37] *Bolster* v. *Lawrence*, 225 Mass. 387, 390.

[38] *Butman* v. *Newton*, 179 Mass. 1; *Waldron* v. *Haverhill*, 143 Mass. 582.

the same ground, for agencies used in lighting streets.[39] . . . in the management of its water department,[40] in the operation of its sewer system,[41] in running a ferryboat,[42] in the letting of a public hall for profit,[43] in managing a farm, partly for the support of its poor, partly for the maintenance of its highway department, and partly for the production of income[44] . . . The difficulty lies not in the statement of the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability; if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence.''[45] The statutory power to establish rates for the use of public facilities conducted as a public duty does not convert the undertaking into a commercial enterprise.[46] As in the case of a public charitable hospital run by a public corporation, the reception of paying patients does not deprive a municipal hospital of its public char-

[39] *Dickinson* v. *Boston*, 188 Mass. 595; *Sullivan* v. *Holyoke*, 135 Mass. 273.

[40] *Hand* v. *Brookline*, 126 Mass. 324; *Johnson* v. *Worcester*, 172 Mass. 122; *Lynch* v. *Springfield*, 174 Mass. 430.

[41] *Allen* v. *Boston*, 159 Mass. 324; *O'Brien* v. *Worcester*, 172 Mass. 348.

[42] *Davies* v. *Boston*, 190 Mass. 194.

[43] *Little* v. *Holyoke*, 177 Mass. 114; *Oliver* v. *Worcester*, 102 Mass. 489, 499.

[44] *Neff* v. *Wellesley*, 148 Mass. 487.

[45] *Tindley* v. *Salem*, 137 Mass. 171.

[46] *Bolster* v. *Lawrence*, 225 Mass. 387, 391.

acter.[47] It is immaterial whether the institution is managed directly by the municipality or by a board of trustees incorporated for the purpose.[48]

§ 93. It was held at one time in New York that a charitable hospital under contract with a city to furnish ambulance service for hire was exempt from liability for negligence of its drivers, because engaged in the performance of a governmental duty;[49] but this theory has not been followed in the later cases, and it is said to be immaterial whether the corporation furnished the service for hire or gratuitously.[50]

§ 94. In respect to immunity from liability for personal injuries, there is no distinction between corporations and trustees under wills or deeds of gift for the maintenance of permanent unincorporated institutions. The trustees of such trusts are acting in a representative and not in a private capacity, and, as they derive no pecuniary benefit from the services of their employees, the rule that renders an organization liable for its servants' torts does not apply.[51] Whether such a defense is open to an individual trustee of a charitable trust of a temporary nature—such as a trust under a will for immediate distribu-

[47] *Benton* v. *Boston City Hospital*, 140 Mass. 13.

[48] Thus it has been held in New York that the immunity from liability for personal injuries extends to a private corporation under contract with the city to furnish ambulance service. *Noble* v. *Hahnemann Hospital*, 112 App. Div. 663.

[49] *Noble* v. *Hahnemann Hospital*, 112 App. Div. 663.

[50] *Van Ingen* v. *Jewish Hospital of Brooklyn*, 164 N.Y. Supp. 832.

Cf. Corbett v. *St. Vincent's Industrial Home*, 177 N.Y. 16.

[51] *Farrigan* v. *Pevear*, 193 Mass. 147, 151.

tion among charitable objects—from liability for the negligence of employees assisting him in the charitable work, either with or without pay, has not been decided. Exemption from liability cannot be had except for those institutions that can qualify in all respects as legal charities, and their character is determined by the publicly avowed purposes stated in their charter or instrument of organization. If they are not strictly charitable institutions, the fact that some of the work they do is charitable is of no consequence.[52] No charitable institution is immune from liability for injuries in work that is *ultra vires.*

§ 95. In respect to injuries to its neighbors' real estate, a charitable corporation is generally held to stand no differently from an individual.[53] It may not take an undue amount of water from a stream to the detriment of the lower proprietors,[54] and it is responsible to its neighbors for damages resulting from a nuisance on its premises.[55] The person injured may recover damages; and, if the injury is of a continuing character, may have relief by injunction.

[52] *Donnelly* v. *Boston Catholic Cemetery*, 146 Mass. 163, 167; *Craig* v. *Benedictine Sisters' Hospital*, 88 Minn. 535; *Gittzhoffen* v. *Sisters of Holy Cross Hospital*, 32 Utah, 46.

[53] *Levingston* v. *Guardians of the Poor*, 2 Ir. Rep. C.L. 202, 219; *Dudden* v. *Guardians of the Poor*, 1 H. & N. 627. But compare § 80, note 1, above.

[54] *Stratton* v. *Mount Hermon Boys' School*, 216 Mass. 83.

[55] *Sturges* v. *Society for the Promotion of Theological Education*, 130 Mass. 414. The building in this case was let for hire for mercantile uses, and no claim was made that the character of the defendant corporation entitled it to immunity. The action was for damages for injury to adjoining buildings through flooding by tide-water negligently admitted through the defendant's premises.

INDEX

SECTION

Abatement of charitable gifts 20
Accumulation, extent permitted 29, 30
Alternative in selection by trustees of charitable or non-charitable use makes gift void 7
Amount that may be left to charity 19
that may be owned by charitable corporation 19
Animals, gifts for benefit of 13
Appointment of trustee 36-39
Attorney-General, powers and duties in respect to charities 49
Beneficiaries, who may be 22, 23
"Benevolent" construed 7
Betterment Assessments 64
Bonds of trustee, when required and when not 39
Boston Athenaeum 9
Boston Protective Department not a charity 17
Breach of Trust, remedies for 40, 43
Bridges, gifts to build 12
Cemeteries, care of, as a charitable use . . . 10
taxation of 70
Charge—see Payment
Charitable Uses / Charities } classification 4, 12
Charity (Public) definition 4, 12
distinguished from private charities . 17, 24
Churches as charities 11
taxation of 69

SECTION
CLASSES of persons and things charitable . . 8-12
CONDITIONS imposed upon charitable gifts . 18, 38
CONTRACTS, trustees' liability on 50
CY-PRES, administration in general . 31, 34, 35
when applied 32
when not applied 33
DEATH of trustee 40
DECLINATION of trustee 40
"DESERVING" construed 7
DISABILITY of trustee 37
DISCRETION of trustee in selection of benefici-
aries 6
of trustee, if essential to gift—effect if
trustee dies—see CY-PRES
DURATION of charity trusts 25-28
EDUCATIONAL USES as public charities . . . 8
EMINENT DOMAIN 45
EQUITY JURISDICTION, *cy-pres* 31-35
instructions 47-48
trustee, appointment and removal of . 40-41
EXEMPTION from taxation—see TAXATION
from liability for torts—see TORTS
FAILURE of trustee 40
of intended gift—see CY-PRES
FEE—see PAYMENT
FOREIGN CHARITIES, taxation of property of . 55
taxation of legacies to 74
GENERAL CHARITABLE INTENT—see CY-PRES
HISTORICAL SOCIETIES as charities 9
IMPOSSIBILITY of performance—see CY-PRES

SECTION
INCONVENIENCE of administration not ground for application *cy-pres* 35
INDEFINITENESS characteristic of charitable gifts 21
INSTITUTIONS named as donee take on implied trust 32-33
INSTRUCTIONS, petitions for, when to be brought 47
when not to be brought 48
LAPSE—see CY-PRES
LAWS, gift to accomplish change not a charity 14
change incidental to accomplishment of charitable object permissible . . . 14
LEGISLATURE, powers in respect to public trusts 45
LIABILITY of trustees 52
of charitable institutions for torts . . 80, 95
LIBRARIES, gifts for 8, 12
LIFE-SAVING STATIONS, gifts for 12
LIMITATIONS, statutes of, in actions against trustees 52
LITERARY USES 8
MAJORITY ACTION of trustees, when controlling and when not 43
MANAGERS, boards of, powers and duties . . . 44
MASSES, gifts for, a religious use 10
MILITARY EFFICIENCY, gifts to promote . . . 12
MORTMAIN ACTS 19
MOTIVE for gift immaterial if object is charitable 24
MUNICIPAL CORPORATIONS, immunity for liability for torts 91-92

SECTION

Mutual Benefit Associations, gifts to . . . 15

National Debt, gifts toward payment of, charities 12

Parks, gifts for, charities 12

Payment to charitable institution for benefits received permissible if not for profit 16, 17, 66

Peace, gifts to maintain 12

Perpetuities 25-28

Personal Injuries, immunity of charitable institutions from liability—see Torts

Petition for Instructions 47, 48

"Philanthropic" construed 12

Poor Relations, gifts for, are not charities . 22

Postponement of application of gift . . . 25-28

how far permitted 26-28, 37

Preference of individuals, directions for, do not destroy charitable gift 23

Public Charity—see Charity

Public Works and Improvements, gifts for . 12

Purposes for which charity trusts may be created 8, 12

Real Estate, trustee's power of sale 46

conversion of—see Cy-Pres

of charitable institutions, taxation of . 58-63

Relators, functions of 49

Religious Societies, taxation of 69

Religious Uses, gifts for, as charities . . . 10

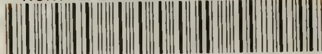
Remedies against trustee 40, 44

Remote Gifts and Rule against Perpetuities 25-28

SECTION

Removal of trustee 40
Research, historical, scientific, etc., as a public charity 9
Sale of real estate by trustee 46
Selection of beneficiaries 9
in respect to discretion of trustee . . . 6, 7
Self Commemoration as motive does not defeat good charitable gift 24
State Board of Charity, functions of . . . 39
Statute of Charitable Uses in force in Massachusetts as part of common law . . 2
construction of 3-4
Subscriptions for charitable purposes . . . 53
obligations of subscribers 53
Substitution of trustee 40
Succession Taxes 73-76
Taxation of charitable institutions, personal property 55, 56
real estate 58-63, 65
betterment assessments 64
religious societies, cemeteries, etc. 69, 70, 77
of legacies 73-76
income taxes 77-78
war-revenue taxes 79
Torts, liability of charitable institutions for 80-95
in actions by beneficiaries 85-87
by employees 88, 90
by strangers 89, 90
of institutions performing governmental duties 91-92
unincorporated institutions 94

SECTION
nuisances, liability for 95
TRUSTEE, who may be 36
powers and duties 39-46
death, disability, removal, succession . . 40
failure of donor to name 41
personal discretion 41
neglect, breach of trust, and removal . . 40
VACANCY in trusteeship 41
in boards of managers 41
VISITORS, powers and duties of 44
WOMAN SUFFRAGE, gifts to bring about—see LAWS
WORDS AND PHRASES indexed under word in question . . . .
WORKMEN'S COMPENSATION ACT 90a
WORLD'S PEACE FOUNDATION, gifts for . . . 12
"WORTHY" construed 7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